



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>





*To be found also Vol 10.
Eq. Chancery &c.*
C A S E S

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY,

DURING THE TIME OF

LORD CHANCELLOR ELDON ;

IN HILARY, EASTER, AND TRINITY TERMS,

55 GEO. III. 1815 ;

WITH A FEW CASES OF AN EARLIER PERIOD.

BY GEORGE COOPER, ESQ.

OF LINCOLN'S INN, BARRISTER AT LAW.

FIRST AMERICAN EDITION,

**WITH NOTES AND REFERENCES TO THE
SUBSEQUENT DECISIONS AND AMERICAN CASES.**

BY MURRAY HOFFMAN, ESQ.

**A MASTER IN THE COURT OF CHANCERY FOR THE
STATE OF NEW-YORK.**

NEW-YORK:

**PUBLISHED BY WILLIAM BEASTALL,
AND SOLD BY G. HALSTED, LAW-SELLER, NO. 3 LAW BUILDINGS.**

C. S. Van Winkle, Printer, 2 Thames-street.

.....

1824.

LEL

2.55299

JUL 3 1901

Southern District of New-York, ss.

BE IT REMEMBERED, that on the twenty-ninth day of April, in the forty-eighth year of the Independence of the United States of America, William Beasall, of the said District, hath deposited in this office the title of a book, the right whereof he claims as Proprietor, in the words following, to wit :

" Cases argued and determined in the High Court of Chancery, during the time of Lord Chancellor Eldon ; in Hilary, Easter, and Trinity Terms, 55 Geo. III. 1815 ; with a few cases of an earlier period. By George Cooper, Esq. Of Lincoln's Inn, Barrister at Law. First American Edition, with Notes and References to the Subsequent Decisions and American Cases. By Murray Hoffman, Esq. A Master in the Court of Chancery for the State of New-York."

In conformity to the Act of Congress of the United States, entitled, " An Act for the encouragement of Learning by securing the copies of Maps, Charts and Books, to the Authors and Proprietors of such copies during the times therein mentioned." And also to an Act entitled " An Act supplementary to an act entitled An Act for the encouragement of Learning by securing the copies of Maps, Charts and Books to the Authors and Proprietors of such copies during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving and etching historical and other prints."

JAMES DILL,

Clerk of the Southern District of New-York.

P R E F A C E.

THE object of the author, in taking these notes, has been information in the pursuit of his profession. Though induced to believe that by an early communication of them to the other members of the profession, he should be doing what might be acceptable, yet he should never have thought of printing them, if he had not been fully assured that it would not be considered as in the least intended to enter into any competition with Mr. VESKY. Indeed, his scruples upon that head were first quite removed by that gentleman stepping forward, and in a most friendly manner himself urging this publication.

It will be seen, that a very few cases are prefixed, which were determined prior to *Hilary* Term, 1815, (the period from which these notes begin in a regular series by the Terms,) and which, therefore, are an exception to what is before observed with respect to early publication; but being very few in number, selected out of a great body of notes taken by the author since Lord ELDON first received the great seal, they do not interfere with the general nature of the work; and it is hoped that some of them, at least, will be favourably received.

The author cannot, while thus shortly speaking of himself, conclude, without expressing his thanks and gratitude to the learned Lord at the head of the profession, for his very encouraging kindness to him. To the Chancery Bar, and especially to some of his more particular friends at it, whom he would be proud to name, did he not know that their delicacy would take the alarm at it, he has to acknowledge much valuable assistance in this work, and a liberal communication from all of notes and papers.

LINCOLN'S INN OLD SQUARE,

17th July, 1815.

ADVERTISEMENT

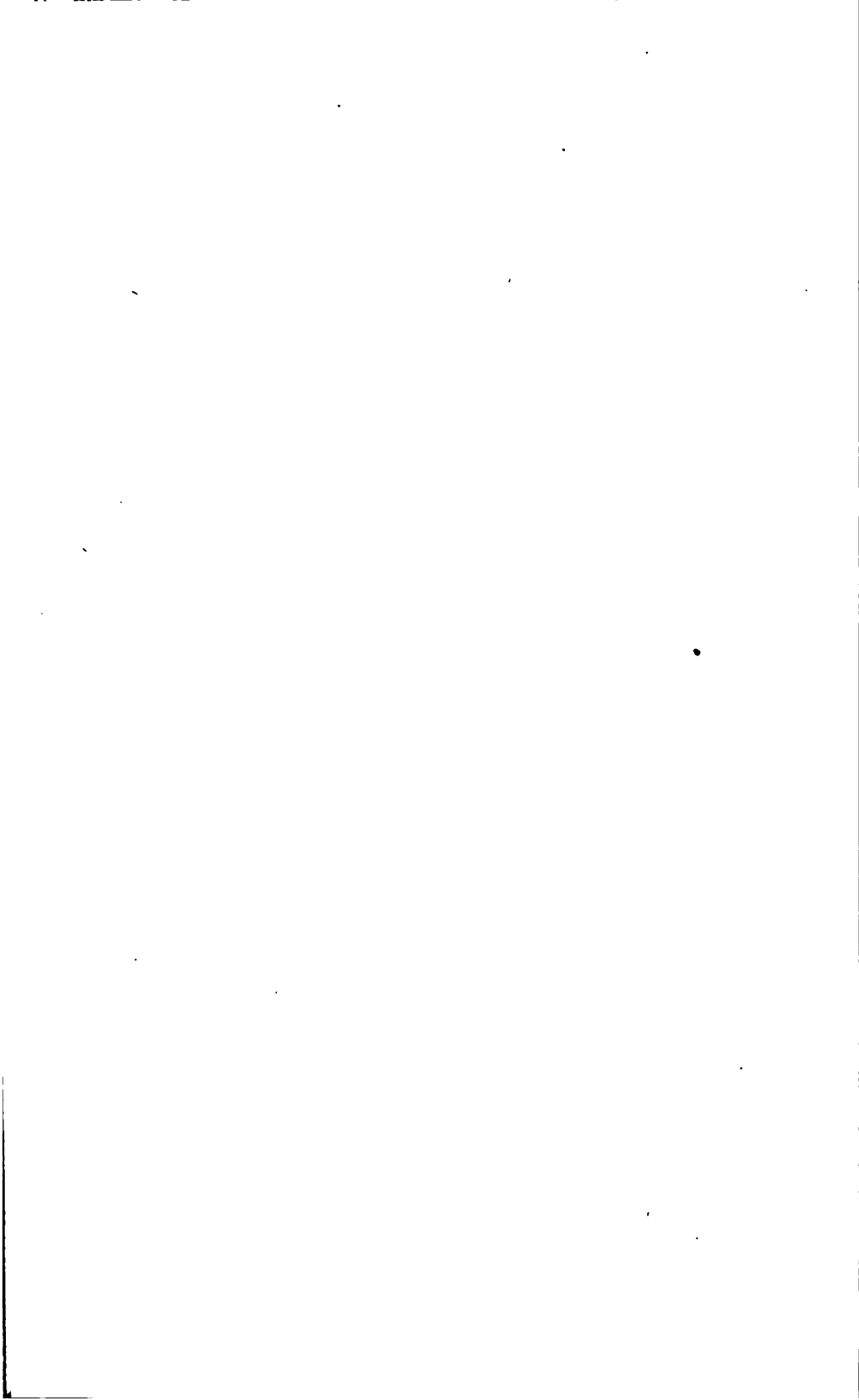
WITH THE SECOND PART.

THE author of these notes having, since the taking of them, been appointed to a judicial situation in *India*, this second and last part is now given to the profession with an Index to the whole, completing thereby a volume.

No possible disadvantage can, it is presumed, be suffered by thus concluding the present undertaking ; the task of continuing the Reports of the Court of Chancery, from the period at which this work closes, having, it is understood, fallen into the hands of a gentleman of that bar,* every way qualified to ensure to the profession a quick and able execution of what he has engaged in.

* John Herman Merivale, of Lincoln's Inn, Esq.

Michaelmas Term, 1815.



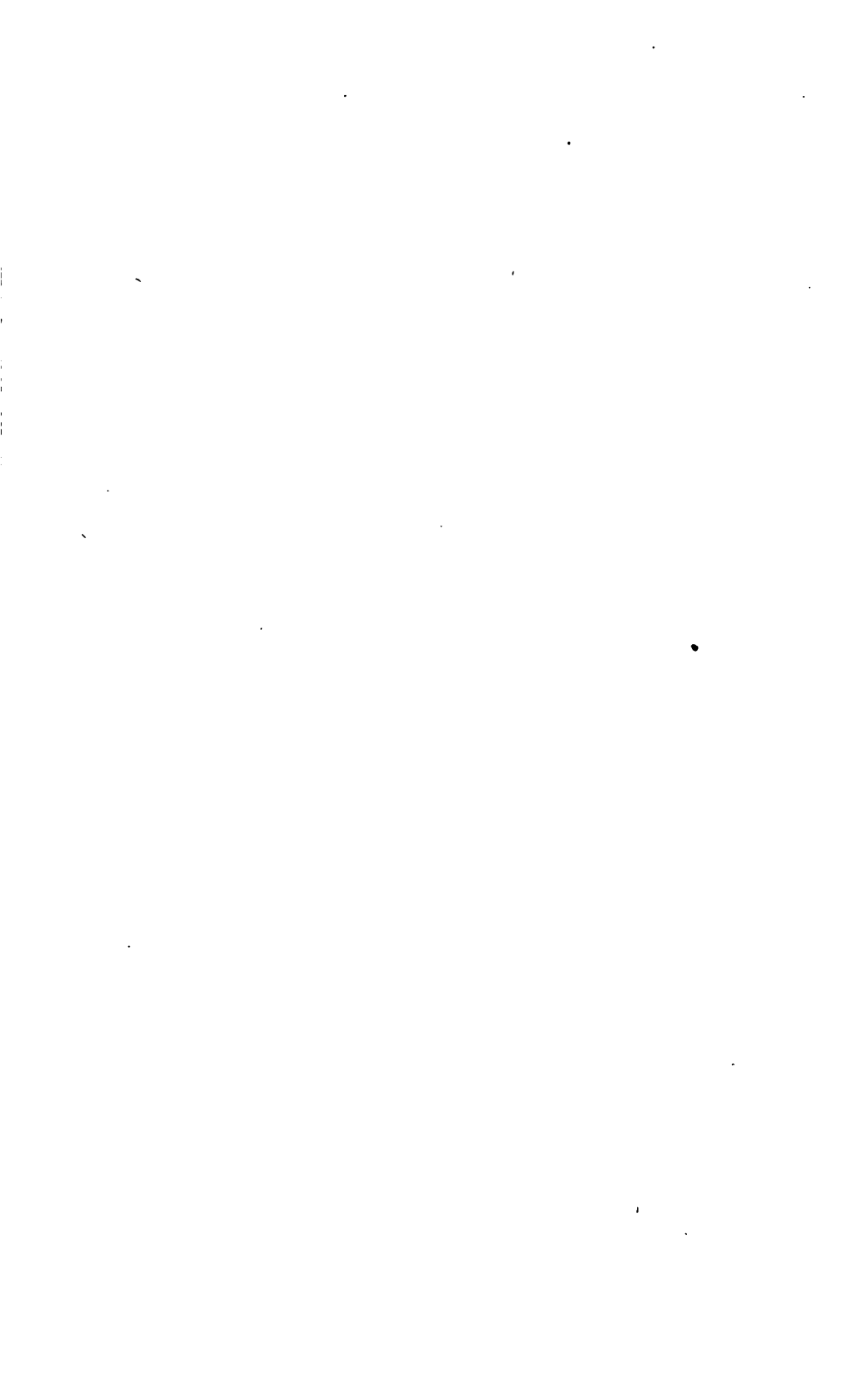
LORD ELDON, LORD HIGH CHANCELLOR.

SIR WILLIAM GRANT, MASTER OF THE ROLLS.

SIR THOMAS PLUMER, VICE-CHANCELLOR.

SIR WILLIAM GARROW, ATTORNEY GENERAL.

SIR SAMUEL SHEPHERD, SOLICITOR GENERAL.



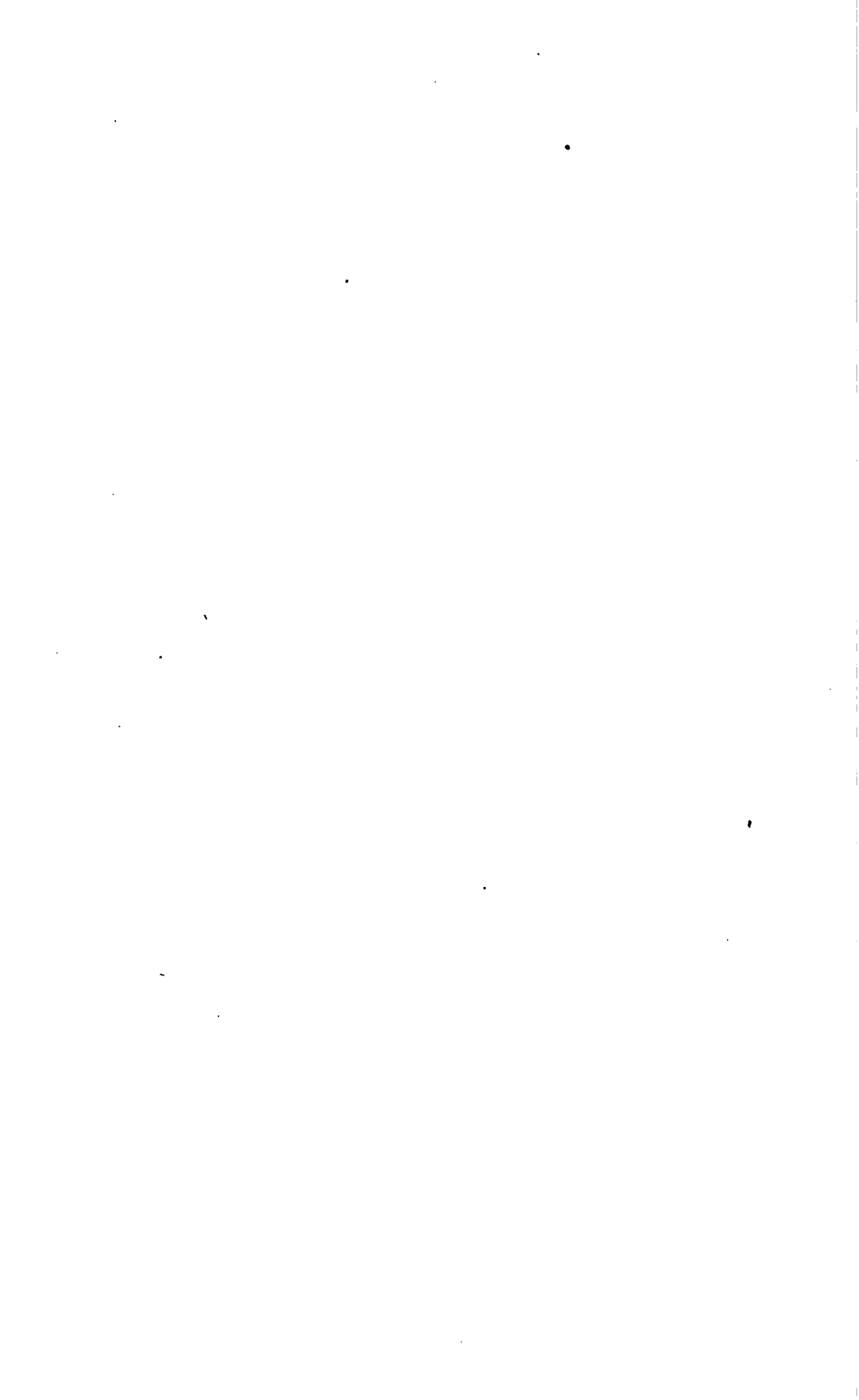
LORD ELDON, LORD HIGH CHANCELLOR.

SIR WILLIAM GRANT, MASTER OF THE ROLLS.

SIR THOMAS PLUMER, VICE-CHANCELLOR.

SIR WILLIAM GARROW, ATTORNEY GENERAL.

SIR SAMUEL SHEPHERD, SOLICITOR GENERAL.



INDEX

OF THE

NAMES OF CASES REPORTED.

N. B. *The letter v. always follows the name of the plaintiff.*

A.		Page
ADAMSON v. Armitage	238	
Agar v. Regent's Canal Company	77. 212. 221	
Armitage, Adamson v.	238	
Atkinson, Wall v.	199	
Atkyns, Wright v.	111	
Attorney General v. Corporation of Carmarthen	30	
Attorney General v. Lord Dudley	146	
B.		Page
Backhouse, Tarleton v.	231	
Baker, <i>Ex parte</i>	205	
Barker v. Harper	32	
Barron v. Martin	189	
Barton, Horne v.	257	
Benson, Dyson v.	110	
Blake v. Luxton	178	
Blewitt, Good v.	197	
Blundell, Bootle v.	136	
Boldero, Lushington v.	216	
Bootle v. Blundell	136	
Brenchley, <i>Ex parte</i>	97	
Brickwood v. Miller	270	
Bromley v. Holland	9	
Vol. I.		
C.		Page
Brown, <i>Ex parte</i>		296
Brydges, <i>Ex parte</i>		290
Bushby, Stockdale v.		229
Button, Platts v.		303
Buxton v. Monkhouse		41
Calley v. Short		148
Campbell, Smith v.		275
Carmarthen, Corporation of, Attorney General v.		30
Cartier, Howgrave v.		66
Cholmondeley, Earl, v. Lord Clinton		80
Clinton, Lord, Earl Cholmondeley v.		80
Collett, Shore v.		234
Const v. Ebers		262
Corson v. Stirling		93
D.		Page
Davis v. May		238
Delight, Wakerell v.		27
De Passou, Moorhouse v.		300
Dickinson, Mylne v.		195
Dixon, Wetherby v.		279

INDEX OF CASES REPORTED.

	Page		Page
Dorchester, Lord, v. Earl of Effingham	319	Hill, <i>Ex parte</i>	54
Dudley, Lord, Attorney General v.	146	Hitchins v. Lander	34
Dunbar, Faith v.	200	Hodgkinson, <i>Ex parte</i>	99
Duncan v. Duncan	254	Holland, Bromley v.	9
Dyson v. Benson	110	Hooper v. Goodwin	95
		Horne v. Barton	257
		Horton, Millar v.	45
		Hawgrave v. Cartier	66

E.

Eaton, Miller v.	272
Ebers, Const v.	262
Edwards v. Harvey	39
—— v. M'Leay	308
Eyre, Gower v.	156

J.

Jackson, <i>Ex parte</i>	286
Jervoise v. Silk	52
Jones v. Gilham	49

F.

Faith v. Dunbar	200
Fraser v. Lloyd	187
Freebody v. Perry	91
Fry, Mills v.	107

K.

Kemeys v. Hansard	125
Kensington, <i>Ex parte</i>	96
Kerrison v. Sparrow	305
King, (The) v. Knox	98
Knox, The King v.	98

G.

Gardner v. Marquis Townshend	301
Garland, Noble v.	222
Gilham, Jones v.	49
——, Paris v.	56
Glossop v. Harrison	61
Glynn, Wallis v.	222
Goldsmid v. Goldsmid	225
Good v. Blewitt	197
Goodwin, Hooper v.	95
Gower v. Eyre	156
Grant v. Munt	173
Gregory v. Gregory	201
Gudger, Roe v.	304

L.

Lambert v. Parker	142
Langston v. Ollivant	33
Land, Waugh v.	122
Lander, Hitchins v.	34
Leatt, Stabback v.	46
Lethbridge, Tonkin v.	42
Lithgow v. Lyon	29
Lloyd v. Parnham	152
——, Fraser v.	187
Lushington v. Boldaro	216
Luxton, Blake v.	178
Lyon, Lithgow v.	29

H.

Haggerston, Weston v.	134
Hansard, Kemeys v.	125
Harmony, Case of the ship	325
Harper, Barker v.	32
Harrison, Glossop v.	61
Harvey, Edwards v.	39
Headley v. Redhead	50
Helmuth, Martinus v.	245
Henderson, <i>Ex parte</i>	227

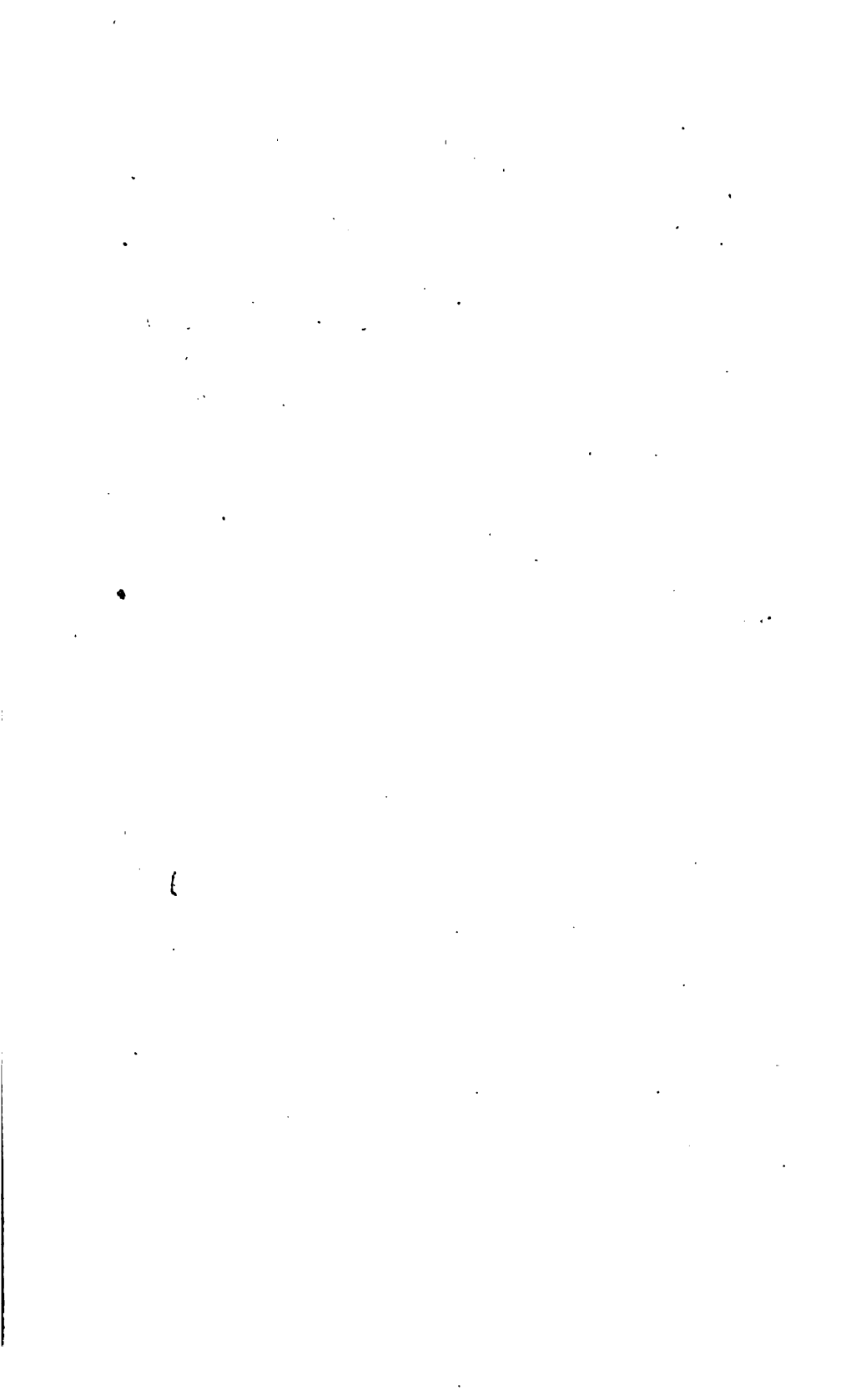
M.

Macnamara v. Lord Whitworth	248
Martin, Barron v.	162
Martinus v. Helmuth	245
May, Davis v.	222
M'Leay, Edwards v.	308
Millar v. Horton	45
Miller v. Brickwood	270
——, Sidney v.	208
—— v. Eaton	272
Mills v. Fry	107

INDEX OF CASES REPORTED.

i
x

	Page		Page
Monkhouse, Buxton v.	41	Skinner v. Sweet	54
Moorhouse v. De Passou	300	Smith v. Campbell	275
Munt, Grant v.	173	—— v. Smith	141
Myne v. Dickenson	195	Sparrow, Kerrison v.	305
N.		Spottiswoode v. Stockdale	102
		Stabback v. Leatt	46
		Stanhope v. Pilkington	193
Noble v. Garland	222	Staple, Platamone v.	250
Noel v. Weston	138	Sterling v. Thompson	271
O.		Steward, Wilkes v.	6
		Stirling, Corson v.	93
Ollivant, Langston v.	33	Stockdale v. Bushby	229
P.		——, Spottiswoode v.	102
		Sweet, Skinner v.	54
		T.	
Paris v. Gilham	56		
Parker, Lambert v.	143	Tarleton v. Backhouse	231
Passingham, Lleyd v.	152	Thompson, Sterling v.	271
Perry, Freebody v.	91	——, Pieters v.	249. 294
Pieters v. Thompson	249. 294	Tonkin v. Lethbridge	43
Pilkington, Stanhope v.	183	Townshend (Marq.) Gardner v.	301
Platamone v. Staple	250	U.	
Platts v. Button	303		
Portsmouth, Lord, in the matter of	106	Utterson v. Utterson	60
Postlethwaite, Reeks v.	161	W.	
Price v. Williams	31		
R.			
		Wakerell v. Delight	27
		Wall v. Atkinson	198
Ralph, Whitfield v.	89	Wallis v. Glynn	282
Ray v. Ray	264	Waugh v. Land	129
Redhead, Headley v.	50	Weston v. Haggerston	134
Reeks v. Postlethwaite	161	——, Noel v.	138
Regent's Canal Company, Agar v.	77. 212. 221	Wetherby v. Dixon	279
Roberts, Esparte	102	White, Whiting v.	1
Roe v. Gudgeon	304	—— v. Williams	58
S.		Whitfield v. Ralph	89
		Whiting v. White	1
		Wickham v. Wickham	223
		Wilkes v. Steward	6
Sanderson, Sherwood v.	108	Wilkinson v. Wilkinson	259
Sherwood v. Sanderson	46	Willan v. Willan	291
Shore v. Collett	234	Williams, White v.	58
Short, Calley v.	148	——, Price v.	31
Sidney v. Miller	206	Wright v. Athyna	111
Silk, Jervoise v.	52		



INDEX

OF

C I T E D C A S E S

FROM MANUSCRIPT NOTES,

OR SUCH AS WERE PARTICULARLY OBSERVED UPON.

Those marked with an asterisk are cited by the American Editor.

A.

	Page		Page
Adolphus Frederick, case of the ship	328. 332	Bonny v. Ridgard	205
*Adsit v. Allen	311	Booth, Whale v.	267
*Adye v. Feuilleateau	6. 33	Boyers, Forside v.	239
Alsagar v. Rowley	252	Bree v. Holbech	311
Alston, Lee v.	161	Brown v. Jones	208. 210, 211
Anderson, Stevenson v.	248	*Bryan v. Cock	31
Aylesbury v. Harvey	268	*Buckworth v. Buckworth	54. 145
		*Bullock v. Menzies	257
		*Bushby v. Munday	294
		Byne v. Vivian	20, 21
		— v. Potter	ibid.

B.

Baker v. Rose	240
Baker's Case	199
*Barford v. Street	285
Baseley, Huguenon v.	155
Bedford, Domett v.	261
Bennett v. Kneebine	240
Berks v. Wigan	270
Bewick v. Whitfield	290
Biles, Spring on dem. Titcher v.	118
Birmingham v. Kirwan	*319.321.324
*Bland v. Bland	116
Blake v. Blake	184
Boehm v. De Tastet	221
Bolton, Franco v.	20
Bolton, Dutches of, Powlett v.	289

C.

Callidge, Hall v.	240
Camden, Lord, Garrick v.	277
Carter, Doe dem. Mitchinson v.	260
Chamberlaine, Philipps v.	254
Chapman's Case	116
Charlton, Sumner v.	95
Clerke, Counden v.	117
Clotworthy, Mellish v.	262
Coulson v. Graham	221
Counden v. Clerke	117
Cowper, <i>Ex parte</i>	286
Cumming, Robinson v.	239
Cunliffe v. Cunliffe	122
Curtis v. Perry	252, 253

D.		<i>*Hallett v. Wylie</i>	57
		<i>*Halsey v. Grant</i>	178
<i>*Davoue v. Fanning</i>	148. 201	<i>*Hamilton v. Cummings</i>	13
<i>Deacon v. Smith</i>	302	<i>Hansard v. Hardy</i>	240
<i>De Tastet, Boehm v.</i>	221	<i>Harding v. Glyn</i>	118. *278
<i>Dighton v. Earl of Macclesfield</i>	240	<i>Hardy, Hansard v.</i>	240
<i>Doe dem. Blake v. Luxton</i>	182. 185	<i>Harland v. Trigg</i>	121
<i>Doe dem. Mitchinson v. Carter</i>	260	<i>*Harrison v. Hogg</i>	31
<i>Dommett v. Bedford</i>	261	<i>*—— v. Horne</i>	ib.
<i>Dorset, Duke of, Woodcock v.</i>	73	<i>Harvey, Aylesbury v.</i>	268
<i>*Drewe v. Hanson</i>	178	<i>*Hayward v. Dimsdale</i>	13
<i>Dubost, Exparte</i>	281	<i>*Hawkins v. Day</i>	136
E.		<i>Helena, Case of the ship</i>	328. 332
<i>Eden, Le Caux v.</i>	329	<i>Hitchin v. Hitchin</i>	323
<i>Edge v. Salisbury</i>	277	<i>Holbech, Brée v.</i>	311
<i>*Edwards v. Cunliffe</i>	28	<i>Hostage, Case of the ship</i>	328. 332
<i>Elisha v. Elisha</i>	240	<i>*Howland v. Norris</i>	177
<i>Ellis, Exparte</i>	228	<i>Huguenen v. Baseley</i>	165
<i>Elton v. Shephard</i>	284	J.	
F.		<i>Jones, Brown v.</i>	208. 210, 211
		<i>*Irwin v. Farran</i>	285
<i>Farr v. Newman</i>	266, 267	K.	
<i>Fenwick, Scott v.</i>	300	<i>Key and Hubbard v. Pearce</i>	329
<i>Ferne, Exparte</i>	109, 110	<i>King v. Watson</i>	31
<i>*Fisher v. Eamer</i>	305	<i>Kingston v. Roper</i>	239
<i>Foderingham v. Wilson</i>	222	<i>Kirwan, Birmingham v.</i>	321. 324
<i>Forside v. Boyers</i>	239	<i>Kneebine, Bennett v.</i>	240
<i>Fox v. Mackreth</i>	148. *201	<i>Knewell v. Gardiner</i>	59
<i>Franco v. Bolton</i>	20	L.	
G.		<i>Lake v. Thomas</i>	167
<i>Gardiner, Knewell v.</i>	59	<i>Lawrence, Whichcote v.</i>	147, 148
<i>Garrick v. Lord Camden</i>	277, *278	<i>—— v. Lawrence</i>	323
<i>Garth, Phillips v.</i>	277	<i>Le Caux v. Eden</i>	329
<i>Glyn, Harding v.</i>	118	<i>Lechmere v. Lechmere</i>	302
<i>Gould v. Tanscred</i>	239	<i>Lee v. Alston</i>	161
<i>Graham, Coulson v.</i>	221	<i>Lemon v. Lemon</i>	323
<i>*Grave v. Salisbury</i>	282	<i>Levet v. Needham</i>	208
<i>*Green v. Howard</i>	278	<i>Lewis, Morgan v.</i>	240
<i>*Gun v. Prior</i>	35	<i>Lindo v. Rodney</i>	329
H.		<i>Lumb v. Milnes</i>	285
<i>Hall v. Callidge</i>	240	<i>Luxton, Doe, dem. Blake v.</i>	182. 185
<i>—— v. Mason</i>	306, 307	M.	
<i>*——, Exparte</i>	208	<i>Macclesfield, Earl of Dighton v.</i>	240

INDEX OF CASES CITED.

xx

Mackreth, Fox v.	148
Macnamara, Rigby v.	95
Maddock v. Maddock	240
Marston, Perry v.	5. 164, 165
Mason, Hall v.	306, 307
*Mayor &c. of Colchester v. Low-	
ton	13
Mellish, Clotworthy v.	262
Mentor, Case of the Ship	328, 332
Mills v. Hanson	305
Milnes, Lumb v.	285
Morgan v. Lewis	240

N.

*Neale v. Waddeson	93
Needham, Levet v.	208
Nostra Signora de los Dolores,	
Case of the Ship	328, 332

O.

Oceana, Case of the Ship	328, 332
Osborne v. Osborne	290

P.

*Parfit v. Sherston	140
*Parkhurst v. Lowton	87
Pate, Urmson v.	311
Pearse, Key and Hubbard v.	329
*Penn v. Baltimore	111
Perry v. Marston	5. 164, 165
Phillips v. Chamberlaine	284
—— v. Carth	277
*Phipps v. Bath	31
*Pope v. Whitcombe	278
Postlethwaite, Reeks v.	192
Potter, Byne v.	20, 21
*Powell v. Cleaver,	136
Powlett v. Duchess of Bolton	289
*Prevost v. Phillips	216

R.

Rastell, Wilson v.	84
*Rayner v. Julian	31
*—— v. Mowbray	278
Reeks v. Postlethwaite	192
Rennington, Sandford v.	84
Ridgard, Bonney v.	205

Rigby v. Macnamara	95
*Riggs v. Sykes	140
Robinson v. Cumming	239
*Roberts v. Roberts	253
*Robinson v. Dugate	285
Rodney, Lindo v.	329
Roper, Kingston v.	299
Rose, Baker v.	249
Rowley, Alsager v.	252

S.

Salsbury, Edge v.	277
Sandford v. Rennington	84
Scott v. Fenwick	300
Selby v. Selby	213
Shephard, Elton v.	284
Shepherd v. Collyer	292, 293
*Shirley v. Stratton	177
*—— v. Davis	178
*Sleece v. Thorington	257
Smith, Deacon v.	302
*—— v. Smith	6
Southcot, <i>Ex parte</i>	206
Spring, on dem, Titcher v. Biles	118
Stevenson v. Anderson	248
Strahan v. Sutton	321
Summer v. Charlton	95
Sutton Coldfield (Corporation of)	
v. Wilson	300
Sutton, Strahan v.	321

T.

Tancred, Gould v.	239
Thomas, Lake v.	167
*—— v. Hale	277, 278
Trigg, Harland v.	121
Tully v. Tully	289
Turner v. Cave	328

U.

Upton, Walters v.	92
Urmson v. Pate	311

V.

Vernon v. Vaudry	45
*—— v. Bethell	198

Vivian, Byne v.	20, 21	*Widmore v. Woodroffe	278
		Wigan, Berks v.	270
W.		*Wilkes v. Steward	33
		*Williams, Matter of,	199
Walters v. Upton	92	Wilson v. Rastell	84
*Ward v. Northumberland	31	———, Foderingham v.	222
Watson, King v.	ib.	———, Corporation of Sutton	
Whale v. Booth	267	Coldfield v.	309
Whichcote v. Lawrence	147, 148	Woodcock v. Duke of Dorset	73
White, Whiting v.	164, 192		
Whitfield, Bewick v.	290	Y.	
*Whithorne v. Harris	278		
Whiting v. White	*160. 164. 192	Yates v. Barker	222

C A S E S

IN

C H A N C E R Y, &c.

BETWEEN 31 GEO. 3. 1792, AND 54 GEO. 3. 1814.

WHITING *versus* WHITE.(a)(1)

Rolls.
July 18, 1792.

THE plaintiff by his bill stated himself to be the grandson and heir at law of Simon Whiting, who, in 1751, mortgaged certain premises to one Barbary Gibson, under whom the defendant claimed, and prayed a redemption, and the defendant and her ancestors having been in possession, it prayed also an account of the rents and profits.

Before Sir
R. P. Arden,
Master of the
Rolls
Bill to re-
deem after
twenty years,
upon parol
evidence of
conversation
with the mort-
gagee, dismissed.

The defendant, Mary White, by her answer, insisted, that as to part of the premises demanded by the bill, they were not in mortgage at all, and never had been the property of Simon Whiting, the plaintiff's grandfather. As to the rest, she stated, from deeds and muniments in her possession, that Simon Whiting, on the 17th March, 1746, mortgaged to one Trotman, by de-

(a) I have been favoured with this note of Master *Alexander*, and its date and value have induced me to place it here.

(1) S. C. 2 Cox's Ca. 290.

Whiting
v.
White.

mising for one thousand years ; that on the 10th June, 1751, by agreement between Whiting and Barnaby Gibson, Whiting agreed to mortgage to Gibson the tenement in mortgage to Trotman, and to pay Trotman off ; that accordingly, by indenture dated 6th July, 1751, for the considerations therein mentioned, Trotman and Whiting assigned the above term of one thousand years to Barnaby Gibson, subject to redemption on re-payment of 58*l.* 16*s.* upon the 6th July, 1752.

With respect to the other part of the premises which was copyhold, she stated, that Whiting, by surrender, dated the 27th July, 1748, surrendered them to one Henry Bacon, with a condition, that if Whiting should pay to Bacon the sum of of 94*l.* 10*s.* on the 27th July, 1749, the surrender should be void, otherwise to remain in full force. That Whiting, by the agreement above stated, of the 10th June, 1751, agreed with Gibson to surrender the same copyhold to him, to secure 100*l.* with interest, paying off Bacon. That accordingly Bacon, on the 22d June, 1751, in consideration of 103*l.* 2*s.* authorized the steward of the manor to enter satisfaction upon the court rolls ; and on the same 22d day of June, 1751, Whiting surrendered to Barnaby Gibson in fee, with a condition of redemption.

That Gibson some time prior to 1758 entered into possession of all these premises, because by his will, dated 28th April, 1758, he devised to his nephew, James White, a messuage and farm to hold to him and his heirs for ever, having surrendered the copyhold to the use of his will, which messuage and farm were the above mortgaged premises. That Gibson died in the latter end of the year 1758 ; upon which James White

CASES IN CHANCERY.

2

entered and possessed, and was admitted to the copyhold premises, and died in 1772, intestate, leaving the defendant, Mary White, his only child, upon which she entered and was admitted to the copyhold, on the 20th July, 1773.

Whiting
v.
White.

[3]

She then stated that Barnaby Gibson, from the year 1758, and James White and herself, having all along been in quiet possession, and whiting having upon the plaintiff's own showing died in the year 1760, and the plaintiff having also upon his own showing attained twenty-one, about twelve years before exhibiting his bill; she upon the whole insisted, that the right of redemption was barred by length of time.

On the part of the defendant the several instruments stated in the answer were produced, and Gibson's possession for two or three years previous to his death was also proved.

On the part of the plaintiff it was proved, that he was the heir at law of Simon Whiting. As to the redemption, one Roberts swore, that in 1778, the plaintiff was his apprentice; that in August in that year he went with Mr. King, his attorney, to defendant, and informed her that he waited on her to redeem the mortgage, when she informed him that she had no objection to give up the mortgage, provided he could show a good title to redeem, and would pay principal and interest. Then the deposition went on to state, "that Mr. King, the deponent's attorney, finding defendant unwilling to be redeemed, dissuaded plaintiff, who was the apprentice to deponent, and had three years to serve, to desist from pressing his claim till he was in a situation to

Whiting
v.
White.

[4]

"do so." The witness farther stated, that about the middle of the year 1789, he went with plaintiff and one Mr. Watts, and told her he had been informed she had an estate to sell, to which she replied she had, and the plaintiff informed her his name was Whiting, and believed she held the said premises by virtue of some mortgage, and she then owned there was a mortgage or mortgages thereon. He farther said, that he then offered to give her a draft for the principal and interest, if she would give up possession of the premises; but defendant said she did not choose to give up the estate. She refused to show the writings. He told her that he should be obliged to file a bill in chancery against her.

Anthony Watts, the person named in the last deposition, swore, that at the conversation in July, 1789, she, the defendant, confessed she was mortgagee of the premises in Offton, and that when Roberts applied to her to redeem, she said she would consult her friends, and the plaintiff then threatened her with a bill in chancery.

King, the attorney, said to be present at the conversation in 1778, was not examined.

The bill was filed on the 27th August, 1789.

On the 18th July, 1792, his Honour gave judgment.

The substance of his Honour's opinion was, that it appeared from the cases that there should be no redemption after a possession of twenty years. But that there was an exception to this rule, where the mortgagee, in

possession, by any solemn act, shows it to be a mortgage, such as by receiving interest, by stating an account, by treating it in any will or deed as a mortgage. He stated the cases in which redemptions had been decreed, and showed that they were all cases in which the mortgagee had in some solemn act in writing, clearly and unequivocally, and deliberately considered himself as mortgagee, and subject to redemption. There was only one case of parol testimony, namely, *Perry v. Marston*.^(a) There Lord *Kenyon* received parol testimony, and decreed a redemption. The decree was reversed by Lord *Thurlow*. His Honour said, "I have looked into the record of that case and seen the depositions." He then stated particularly the circumstances of that case.⁽¹⁾

Whiting
v.
White.

[5]

What Mr. *Brown* stated, he said was true ; but that he had not stated all. (b.)

(a) 2 Bro. Rep. 397.

(b) See the farther material evidence in this case taken from the register's book by the Vice Chancellor, introduced into a note to the case of *Reeks v. Postlethwaite*, post.

(1) In the case as reported by Mr. Cox, (2 Cox, 295.) the facts of *Perry v. Marston* are stated at length by the Master of the Rolls. It appears that several witnesses swore to an unequivocal admission by the mortgagee of the premises being held in mortgage. The decree was reversed: but not upon the impropriety of admitting such testimony. An expression of Lord *Thurlow* rather sanctions the decision. See 2 Br. C. C. 399.

In *Reeks v. Postlethwaite*, post, 161. the Vice Chancellor, after much consideration held, that parol testimony as to acts or declarations of the mortgagee, treating the mortgage as subsisting were admissible. But he held the evidence of the parol admission in that case to be insufficient.

Whiting
v.
White.

It appeared from his Honor's statement, that the real question in the cause ought to have been, whether it was or was not a mortgage ; whether the trusts to which by the last surrender to Marston, that surrender to Marston was made subject, was a proviso of redemption. And he stated strong circumstances to show that it was not the proviso of redemption. His answer was sworn on the 24th May, 1780, by which he himself swore that he was not mortgagee, and insisted upon his title, and five or six witnesses swear, that in June, 1780, or about that time, he said that he had kept accounts as mortgagee, and that he was willing to be redeemed. All this a few months after he had himself sworn that he was not a mortgagee, and would not be redeemed. This his Honour said was sufficient to show the danger of parol evidence. Lord *Kenyon*, however, admitted it, and acted upon it. This, therefore, is the opinion of a learned judge, that such evidence is admissible. The decree, however, was reversed by Lord *Thurlow*, and, I think properly, because he did not think that there was any mortgage at all, but that Marston had an absolute title.

[6]

“ I will not lay it down in this case that no parol evidence shall ever be admitted, because this case does not call for it, though I should be glad to find it so ruled, and the case of *Perry v. Marston* itself is strong evidence of the wisdom of the statute of frauds. But thus much I will say, that if such evidence be admitted, it ought to be clear, unequivocal, and to show a deliberate intention of giving a redemption, which is not the case here.”

He observed that *King*, the attorney, was not examin-

ed ; that even the first conversation in its result showed that the defendant was not willing to be redeemed, and by the record it was expressly sworn so.

Whiting
v.
White.

He dismissed the bill, but without costs. (a)

MARY WILKES *versus* JOHN STEWARD.

Rolls.
Nov. 17, 1801.

THIS was a bill against the defendants as executor and executrix of S. Hurtle, for an account, and to have a legacy of 1000*l.* secured to them, and for such purpose paid into court upon the trusts of the will.

Executors cannot lend money on personal security, though words which may imply a discretion so to do are used by the testator. (1)

The defendants by their answer stated, that by the will they were empowered either to lay out the legacy in the funds, "or on such other good security as they "could procure and think safe," and that they had invested the money upon good security, or such as they think safe: they admitted that the plaintiff, Mary Wilkes, was entitled to the interest for her life, and that after her death, the principal was to be divided amongst all the children living at that time ; but they said that in case Mary Wilkes left no children living at her death, then, and in that case, the testator had given the said 1000*l.* to the defendant, Mary Steward, and her grandson, Samuel Smith, equally to be divided between them, and the issue of their bodies, and in default of issue of the said Samuel Smith, then the whole to the defendant,

[7]

(a) See *Reeks v. Postlethwaite*, and *Baron v. Martin*, post.

(1) See *Adye v. Fwilletau*, 1 Cox's Cas. 60. and note. *Smith v. Smith*, 4 Johns. C. R. 281. 445.

Wilkes
v.
Stewart.

Mary Steward. The defendants also admitted that the other plaintiff Elizabeth Wilkes, was the only daughter of the plaintiff, Mary Wilkes, who had lived to attain the age of twenty-one ; and they submitted to account if necessary.

The cause was heard on bill and answer.

Mr. *Lloyd* and Mr. *Wingfield*, for the plaintiffs, argued that the plaintiffs were entitled to have the security of the court ; that the defendants had acted uncandidly in not stating upon what security they had laid out the money ; that they had, it was fair to suppose, kept the money in their own hands, and were therefore guilty of a breach of trust for which they were answerable.

[8]

Mr. *Richards* and Mr. *Cooper*, for the defendants, contended that the testator had given them a discretion to lay out the money as they should think proper ; that they had sworn by their answer, that they had laid it out upon good security, and exercised the best judgment they could upon the subject ; that the plaintiffs could not therefore infer that they, the defendants, had retained it in their own hands ; that they being entitled to the legacy in the event of the plaintiff, Mary Wilkes, dying without children living at her death, were interested in seeing that the money was lent upon good and sufficient security ; that the reason why the defendants had not stated what security they had taken was, because they had not been asked, there being no interrogatory in the bill to that effect ; and that the plaintiffs by not replying to the answer had shut the defendants out from proving in evidence the fact sworn to in the answer, of their having laid out the 1000*l.* upon good

CASES IN CHANCERY.

security ; that they were not tied down to the alternative of laying it out in the funds, or upon real security ; and that even supposing they had laid it out upon bond, that they were justified in so doing, by the discretionary power given them by the will.

Wilkes
v.
Stewart.

Sir *William Grant*, the master of the rolls, was clearly of opinion that the defendants had no power to lay out the money upon personal security ; that it was like trustees to sell who could not be justified in selling for any other price than the best price that could be got for the property ; and that the plaintiffs were fully entitled to the security of the court.

It was accordingly referred to the master to inquire and state to the court upon what security the defendants had laid out the money.

N. B. The executors had, in fact, lent the money upon bond

ROBERT ANTHONY BROMLEY, Clerk,

versus

ARABELLA HOLLAND, TIMOTHY TYRRELL, and RICHARD OAKDEN.

[9]
*Lincoln's
Inn Hall.
March 15, 16,
17, and May
7, 1802.*

THIS was an appeal from a decree of Lord *Alvanley*, the late Master of the Rolls, by which the securities for an annuity, granted by the plaintiff were under the circumstances decreed to be delivered up upon the terms of the plaintiff paying the whole consideration money paid for the assignment of it by the defendant Holland

The Court of Chancery has jurisdiction, even after the grantor of an annuity has twice failed at law in his attempts to set aside the annuity, to de-

CASES IN CHANCERY.

Bromley
v.
Holland,
Tyrrell, and
Oakden.

clare it void and order the securities to be delivered up, and the payments of the annuity from the date of it to be deducted from the consideration paid for it. The price paid by the grantee, and not that by the assignee, is to be taken in the account.

The decree at the Rolls, directing the account of payments made by the grantor, only from the bill filed, was reversed. S. C. 7 Term Rep. 455. 5 Ves. 610. 7 Ves. 3.

[10]

from Thomas Peacock, to whom Samuel Greatheed, the original grantee had assigned it. The petition of appeal prayed that the payments which had been made of the annuity since the original grant of it in 1788, might be allowed the plaintiff in account, and deducted from the consideration paid for the assignment.

The material facts of the case were as follow: The grant of the annuity was by deed of the 16th May, 1788, between the plaintiff of the first part, Samuel Greatheed of the second part, and the defendant Tyrrell of the third part, whereby in consideration of 600*l.* paid by Greatheed, the plaintiff granted an annuity of 100*l.* a year for the life of plaintiff, and he thereby also demised to the defendant Tyrrell, for the term of ninety-nine years, if he, Bromley, should so long live, the tithes of the United Rectories of St. Mildred and St. Mary Colechurch, London, for securing the payment of the said annuity; and the plaintiff also executed a bond and warrant of attorney to confess judgment thereon, as farther securities for the said annuity. By indenture of the 2d April, 1792, Greatheed sold and assigned the said annuity with the said securities to Peacock, and thereupon the defendant Tyrrell assigned his interest in the said term to Thomas Flashman, as a trustee for Peacock. By indenture of the 17th February, 1795, Peacock assigned the annuity and securities to the defendant Holland; but Flashman remained trustee of the term. The plaintiff, in Hilary term, 1794, applied to the court of King's Bench to set aside the said annuity, upon objections not material now to state, and obtained a rule for that purpose; which rule however was afterwards discharged with costs.

The annuity afterwards becoming in arrear, and the plaintiff being pressed for payment, executed a farther indenture of the 1st June, 1795, whereby he, the said Bromley, authorized and empowered the defendant Oakden, (who was then in possession of the tithes and profits of the said United Rectories, under and by virtue of a demise thereof to the said Oakden, of the 20th June, 1794, for the better securing of another annuity of 50*l.* a year, for the life of plaintiff to one Ralph Oakden,) to pay and apply the residue of such rents and profits, after satisfying the said annuity of 50*l.* to Ralph Oakden, in payment of the annuity of the defendant Holland. In Michaelmas term, 1798, the plaintiff again applied to the court of King's Bench to set aside the said annuity; but which rule was also discharged upon discussion, in as much as the court refused to entertain a second application between the same parties on the same state of facts, though grounded upon a new objection to the annuity, which was not before urged or considered. See the case under the name of *Greatheed v. Bromley*, in Dunford and East's Reports, vol. vii. p. 455. The plaintiff, on the 18th June, 1798, having thus twice failed at law, filed his bill in chancery for relief, and on the 4th July, 1800, the above decree was made at the rolls, against which the plaintiff now appealed.

Bromley
v.
Holland,
Tyrrell, and
Oakden.

[11]

The *Solicitor General*, (a) for the plaintiff.

The clause of redemption contained in the grant of his annuity, not being stated in the memorial, the annuity is clearly void, and it is unnecessary to state other objections. The only question then being as to the ex-

(a) The Honourable Spencer Percival.

Bromley
v.
Holland,
Tyrrell, and
Oakden.

tent of the relief to be now given, the cases of *Byne v. Vivian*,^(a) and *Byne v. Potter*,^(b) show that the account must be taken from the date of the annuity.

The only particular circumstances of this case to distinguish it from others, are the two assignments; first to Peacock, and afterwards to the defendant Holland, and the plaintiff's conveyance of the 1st June, 1795, to the defendant Oakden, as a trustee to pay the annuity. But as to the assignments, an assignee is not entitled to more favour than the original grantee, otherwise the statute might be evaded by assignments. As to the assignment to Oakden, the plaintiff only consented to it to prevent an execution. His Honor was of opinion that the plaintiff in this case was only entitled to the benefit of the clause of redemption; but the bill does not pray a redemption, and no case has stopped short with giving that relief. *Howson v. Hancock*,^(c) differs from this case upon the principle stated by Lord Mansfield in *Smith v. Bromley*.^(d) This is a case of oppression, not *delictum*.

[12]

Mr. Piggott. This decree treats the contract as a valid and subsisting one, containing a clause of redemption, and gives relief under that clause, but no farther; whereas the contract is void. The defendant not having refused to allow a redemption, the bill to redeem was unnecessary, and if it is to be considered as such, it ought to have been dismissed. As to the assignments of the annuity, the plaintiff was no party to either of them, and with regard to the assignment to the trustee

(a) 5 Ves. 604.

(b) 5 Ves. 609.

(c) Durnf. and East, 572.

(d) Doug. 670. note.

Oakden, that assignment gives jurisdiction to this court, and the plaintiff must in consequence of it come here to disentangle his property from the trusts of that deed. He cannot have relief at law, because courts of law have jurisdiction to set aside the securities only in the four cases specified in the act,^(a) of which this is not one.

Bromley
v.
Holland,
Tyrrell, and
Oakden.

Mr. *Leach*. The deed being void in this case, the only question is, whether the court has relieved according to its rules. Now there is no case but the present where the parties have not been put into the same situation. This decree must have proceeded upon a confusion between the cases of deeds voidable, and of those void, *ab initio*. The deed of 1st June, 1795, cannot be considered a confirmation of the annuity by the plaintiff; for how can a deed creating a mode of payment be more a confirmation than a payment itself? besides, a void deed cannot be confirmed.

Mr. *Mansfield*, for the defendants Holland and Tyrrell.

There are two questions in this case: 1st. Whether any decree at all ought to have been made? 2d. Supposing there ought, whether the relief given is not sufficient? as to the first, I consider the defendants entitled to raise that question, although they have not presented any cross petition of appeal. This court has no jurisdiction to order deeds which are void at law to be delivered up, such relief being unnecessary where the instruments cannot be made use of against you. *Franco v. Bolton*.^(b) The contrary cases of *Byne v. Vivian*,

[13]

(a) 17 Geo. 3. c. 26. s. 4.

(b) 3 Ves. 368.

Bromley
v.
Holland,
Tyrrell, and
Oakden.

and *Byne v. Potter*, are not warranted by any previous authority, and are irreconcilable with each other.⁽¹⁾ The present case affords particular grounds to induce this court not to interfere; that it has been twice before the court of King's Bench, and is *res judicata*, and has besides been confirmed by the plaintiff's own deed subsequent thereto of 1st June, 1795. 2d. As to the terms; I consider the payments made as of an annuity, which the grantor chooses should subsist. Where is the honesty of the plaintiff going on paying the annuity as long as he finds it beneficial, all the time taking his chance of the life dropping, and when the advantage is against him, by the purchaser having received back again as much as his principal money and interest, in then stopping the payments and insisting upon a flaw? The grantee during this time is living up to his income, deceived by the grantor with the notion that the annuity is valid, confirmed by the payments being continued. These payments being voluntary, cannot be got back; no action could recover them. There is besides in this case a want of parties, the legal estate not being in Tyrrell but in Flashman, who is not before the court.

Mr. Richards. The court has no jurisdiction to order these instruments to be delivered up, which principle is

(1) Lord Eldon has repeatedly declared that in his opinion a Court of Equity had the jurisdiction, and it was its duty to order a void deed to be delivered up to those whose property it affected. A Court of Equity ought not to suffer such a cloud to remain on a person's title. *Hayward v. Dimsdale*, 17 Ves. 111. *Mayor, &c. of Colchester v. Lowten*, 1 Ves. & Bea. 244.; and this rule has been recognized by Chancellor Kent. *Hamilton v. Cummings*, 1 Johns. C. R. 520.

settled by Lord *Thurlow*, in *Ryan v. Muckmath*,^(a) and by the subsequent case of *Franco v. Bolton*. But at all events the payments cannot be recalled, because the plaintiff has availed himself of the grantee's dishonesty, if it is such, by letting him run all the risk.

Bromley
v.
Holland,
Tyrrell, and
Oakden.

[14 [

Mr. Cooper. The proposition that upon this petition of the plaintiff the whole case is open to the defendant, is clear by the terms of the prayer of the petition, which are, that the plaintiff "appeals from the said decree" generally; by the case of *Rawlins v. Powell*,^(b) where it is laid down that upon a plaintiff's petitioning to rehear, the cause is open as to the whole, and every part of it with respect to the defendant, while in relation to the plaintiffs it is only open as to those parts of it complained of in the petition; and by the subsequent practice. The defendant therefore has a right to contend that this court cannot take cognizance of the case after two decisions at law, although there might be a distinction probably upon the question, whether the grantor was thereby precluded from defending attempts made by the grantee to enforce payment of the annuity. But here the application is made by the grantor to set aside the annuity, after he has so twice failed in the other court. Nor can the deed of trust of the 1st June, 1795, give this court jurisdiction, the trustee of it not being before the court, and the object of the suit not being to compel him to account. Lord *Kenyon's* judgment upon this case, when brought before him the second time founded upon the notion that the matter must be taken to have passed in *rem judicatam*, it appears that he afterwards, upon mature consideration, approved of, for in

(a) 3 Brown's Rep. in Ch. 15.

(b) 1 P. Wms. 300.

Bromley
v.
Holland,
Tyrrell, and
Oakden.

[15]

the case of *Schumann v. Weatherhead*,^(a) he refers to this case, and his decision upon it, which he recognizes and again acts upon. This case, when before Lord *Kenyon* the second time, is an instance of a second application in the same court being refused ; but in *Hart v. Lovelace*,^(b) the court went a step farther, and held that if the validity of an annuity has once come in judgment before a court of competent jurisdiction, no other court will suffer the same objection to be stirred again. The present bill filed was then a species of appeal from decisions at law to a court of equity, against a purchaser with the law in his favour, and upon mere legal objections. For this there is no authority ; for in *Byne v. Vivian*, and *Byne v. Potter*, there had been no previous application at law, nor had there been any confirmation of the annuity by subsequent deed, which instrument did not merely create a mode of paying the annuity, but was adding to the securities of the annuity an instrument which could not be invalidated, because not necessary to be memorialized, being subsequent. In *Ex parte Maxwell*,^(c) where an annuity had been paid about four years, and the grantee was dead, the court refused to permit the consideration to be questioned, and doubted whether it could be done after six years, by analogy to the statute of limitations. In the present case the grantee is out of the case, having assigned, and is not made a party to the suit, and fourteen years have elapsed. Secondly, at all events the plaintiff ought not to be allowed an account of payments before filing the bill. This is in the nature of *assumpsit* to recover back those payments. How would it be at law ? The contract in

(a) 1 East, 537.

(b) 6 Term Rep. 471.

(c) 2 East, 85.

question is a contract of risk, in which the risk has been run, and that being so, and though the contract may be void at law, the money paid can never be recovered back. If money has been paid on an illegal contract of insurance, or bottomry and respondentia, the risk having been run, it shall not be recovered back. *Lowry v. Bourdieu*,^(a) *Andree v. Fletcher*,^(b) *Munt v. Stokes*,^(c) and *Cotton v. Thurland*,^(d) the distinction being between contracts executed and executory; and if you want to rescind the contract you must do it while the contract remains executory. Here the risk has been run, and the payments made, and therefore cannot be recovered; indeed, payments in general, according to justice and good conscience, though they could not have been enforced, cannot be recalled at law: as upon a bill of exchange not stamped, or of a debt barred by infancy, or the statute of limitations, put by Lord Mansfield in *Bize v. Dickason*,^(e) of a bond with a defect. It is therefore not true that the court will rescind where it will not enforce, or that payments under a void security cannot be supported. *Howson v. Hancock*,^(f) was still stronger, where money deposited upon an illegal wager was paid to the winner by the stakeholder with the consent of the loser, it was held, that the loser could not afterwards recover them back. If this is so at law, how is it in equity? This is not a case of usury, fraud, or surprise, there is nothing in the original terms to vitiate the bargain, the defect is not in substance but in a collateral matter, and the contract has been deliberately confirmed by the plaintiff. If therefore equity relieves at all it should be upon the terms of not so far

Bromley
v.
Holland,
Tyrrell, and
Oakden.

[16]

(a) Doug. 451.

(c) 4 Term Rep. 561.

(e) 1 Term Rep. 286.

Vol. I.

(b) 3 Term Rep. 266.

(d) 5 Term Rep. 405.

(f) 8 Term Rep. 575.

Bromley undoing the original transaction as to make the de-
 v.
 Holland, fendant refund without farther grounds than appear in
 Tyrrell, and this case.
 Oakden.

The *Solicitor General*, in reply,

[17] Conceded to the defendants the point made, that it was competent to them upon the plaintiff's appeal against the sufficiency of the relief to contend that no decree at all ought to have been made. But he relied upon the cases of *Byne v. Vivian*, and *Byne v. Potter*, as showing that the court would grant some relief to the plaintiff, at least to the extent of ordering the securities to be delivered up. Those securities being unquestionably void, they ought not to be permitted to remain in the defendant's hands, upon the principle *quia timet*, it being possible that an action might hereafter be brought upon them, as by the defendants alleging their loss, in order that the defects upon them might not appear ; or upon the judgment, as at all events the judgment cannot be got rid of unless by the interposition of this court. Upon the other point, as to the insufficiency of the relief, the plaintiff insists that the contract being void, *ab initio*, the money paid with interest on the one hand, and the payments of the annuity on the other, must be taken into account, and the one set off against the other. Nor can those payments be considered any more as voluntary, than the payment of the consideration ; or than those made in the cases of usury ; nor can the relief given in cases of usury be different from that to be granted in the present case. But in truth, the payments are not voluntary, but made by mistake, under the idea of the annuity being valid, such notion being confirmed in the present case by the result of the proceedings at

law. The cases of illegal contracts executed, where the payment has been made, proceed upon this principle, that each party being alike *particeps criminis*, the maxim applies of *potior est conditio defendentis*; whereas the annuity act was intended to relieve the needy against usurers and money lenders. Executory contracts, where the money may be recovered, are upon the principle that the plaintiff chooses in proper time to disaffirm the contract, by which he frees himself from the imputation of criminality. Nor can the length of time avail in this case. Lord *Kenyon's* allusion to the statute of limitations in *ex parte Maxwell*, is a mere *dictum*, quæ est impossibile to be supported.

Bromley
v.
Holland,
Tyrrell, and
Oakden.

[18]

Lord Chancellor Eldon.

This cause comes on upon the petition of appeal of the plaintiff. The petition states the grant of the annuity by deed, dated the 16th May, 1788, accompanied by bond and warrant of attorney; the assignment, dated the 2d April, 1792, by Greatheed to Peacock; and the assignment, dated the 17th February, 1795, by Peacock to Holland; and the deed executed by the plaintiff, dated the 1st June, 1795, to Oakden; and prays to have the said deeds and instruments delivered up, and to have credit for the several payments made by him on account of the annuity since the granting thereof, as against the consideration money and legal interest thereon. The answer to the original bill states, that on the assignment of the annuity to Peacock, the defendant Tyrrell assigned all his right and interest to Flashman. It appears then, that Tyrrell has no estate, even apparent, which could call for him to be a party; and it is objected that Flashman is a necessary party,

Bromley
v.
Holland,
Tyrrell, and
Oakden.

If the trustee of a term to secure the payment of an annuity assigns the term to a third person, such third person should be a party to a suit to have the securities delivered up, as void.

and not before the court. The answer given to this is, that if the conveyance to Tyrrell was void, he conveyed nothing to Flashman. On the other hand the difficulty arises, that as the annuity is good at law, Flashman must have the legal estate in the term. The plaintiff, therefore, may find it necessary hereafter, in order to clear his title, to have a re-conveyance of the legal estate from Flashman, and he being only a trustee for Holland, the latter must be a party to such second suit, and so is liable to double vexation by a second suit from the circumstance of Flashman not being a party to the present one ; I am, therefore, not sure that if the objection for want of parties was insisted on, that I could relieve the plaintiff from it. Tyrrell might have disclaimed in three lines, and there was no necessity to bring him to a hearing ; but I very much question whether Flashman should not.

[19]

I cannot agree with Lord *Alvanley*, that this is a suit to redeem the annuity ; but I think it a suit asking for a decree upon equitable grounds, if any such there are, and in a case in which the court is bound to state that there never was any legally existing annuity which could be redeemed.

Upon the first question which arises in this cause, that is, as to the jurisdiction, the Annuity Act has produced this singular state of circumstances, that although this annuity is good for nothing, yet the court of King's Bench have twice refused to act upon that invalidity ; and this unseemly incongruity also appears, that if a question arose in any other court upon the rights of the parties on these instruments, every other court must say the grantee has no right. There might, however, have

been want of proper evidence when the applications were made to the Court of King's Bench, and the contents within the four corners of the deed granting this annuity could not have been looked at with the memorial of the same. If money had been levied under the judgment, I think that court must see great difficulty how the party could hold the money under such a judgment. I lay the applications to the Court of King's Bench out of the case. I think the securities are void at law, and having no doubt upon that point, think it unnecessary to send the case to law ; and should also think it disrespectful to the Court of King's Bench to send it there a third time.

Bromley
v.
Holland,
Tyrrell, and
Oakden.

The next consideration is, whether equity has jurisdiction to order void securities to be delivered up. If that were *res integra*, I should have great doubt about it, from the powerful argument of Mr. Mansfield in *Byne v. Vivian*. But that question appears to have been three times decided by Lord Rosslyn and Lord Alvanley, that this court has jurisdiction, so that a jurisdiction has been exercised in four decisions.

[20]

The legislature in the Annuity Act has declared the practice of lending money in that way is pernicious ; the mischief is not to public, but to individual interests. The ground of its being pernicious is thought to be the secrecy with which such transactions are generally carried on, and the statute accordingly provides remedies to the evil arising from that secrecy. Whether those provisions are wise, I stay not here to consider ; but must deem them to be so. I make these remarks because it has been strongly urged, that in this case there has been no circumvention, which argument is not as

Bromley
v.
Holland,
Tyrrell, and
Oakden.

Questionable,
whether the
summary
jurisdiction
over property
given by the
annuity act, is
not unconsti-
tutional.

[21]

If grantee of
an annuity
voluntarily
destroyed his
deeds to con-
ceal their de-
fects, and sued
upon the me-
morial at law,
a court of equi-
ty would take
cognizance of
the case.

admissible as it is strongly put, because the legislature having characterized the nature of the transaction, and the mischiefs to be redressed arising from secrecy, this case is not to be decided merely as between the individuals on this record, but as the act directs, between all persons whatsoever dealing in annuities. If this act is objectionable, I think that it is most so upon the ground that the summary jurisdiction given by it over property is inconsistent with the policy of the law and constitution of this country. That this court has inherent in it power to give farther relief than the act has given it, would, if *res integra*, be a grave question ; but now on the best consideration I can give, I think it has that power, and I not only hesitate in acceding to Lord Rosslyn's opinion in *Franco v. Bolton*, but actually do not concur in it ; there is an ancient jurisdiction in this court in putting on a record other considerations than appear in a deed, and such jurisdiction may be necessary to be upheld in this sort of case : suppose the grantee of the annuity chose to throw his deed into the fire, and say there was no clause of redemption in it, could he sue upon the memorial ? The dispensing with a *profert* at law might enable him ; but this court would interfere. There is also an ancient jurisdiction in this court to order bills, policies of assurance, and annuity deeds to be delivered up ; the same too is always prayed in policy causes in the exchequer ; and it is a wholesome jurisdiction to order void instruments to be delivered up, upon which vexatious demands might afterwards be made.

In the discussion of this case at the rolls, and since here, a good deal has been said upon the case of payment of an unstamped note of hand, or bill of exchange,

in which the payment cannot be recovered back, and which it has been thought furnishes an analogy for the present case. But it seems to me that there may be a considerable difference between securities of that sort, which upon the face of them can create no demand, and the case of a deed of grant of an annuity which upon the face of it purports to affect real property. The late *Attorney General*, in arguing *Byne v. Vivian*, and *Byne v. Potter*, seems also to have relied a good deal too upon the circumstance of such an instrument forming a cloud upon the title of an estate, and it is certain, if the party is permitted to keep such a deed, he might by the production of it some time hereafter defeat the ends of justice, the opposite party not being able immediately to prove the circumstances *dehors* the instrument which makes it invalid. There was one case in the *King's Bench* in which the power of granting an annuity out of a rectory was questioned upon an old statute; but suppose the present annuity had been secured upon a life interest in lay property, and the grantor brought an ejectment, the outstanding term might be produced by surprise to defeat that action, and the lessor of the plaintiff, as is often the case, not being ready to meet such evidence by the necessary proof, a dishonest use would thus be made of the term to prevent a recovery according to the right. That being so, and this court having exercised jurisdiction in the cases which I have before referred to, if those cases are thought wrong the reversal of them should be elsewhere.

Bromley
v.
Holland,
Tyrrell, and
Oakden

[22]

Upon the other material question as to the terms, if the matter were *res integra*, I should have great doubt. The objection has always appeared to me to be unanswerable, in a moral point of view, that it was inconsis-

Bromley
v.
Holland,
Tyrrell, and
Oakden.

tent with the conduct of an honest man taking an annuity, and paying it as such as long as it is beneficial to him, and when it is no longer so, then turning round and insisting in a court of justice that what he has so long paid as an annuity has been nothing but a re-payment of the consideration with interest. Upon the maxim "*quod dubitas ne feceris*," I should not have done so. But sitting here in a court of justice, I must not decide the case in a moral point of view. Courts of law, within my recollection, in deciding upon the sound principle that payments voluntarily made shall not be recovered back, would not, upon an annuity being set aside, allow the payments to be deducted from the consideration. The idea could not be endured, that if the grantee died at the end of the first year, it should be considered as an annuity in favor of the grantor, from whom none of the consideration should be recalled ; but that at the end of five or six years, when the grantor had paid as much as the consideration with interest, that he might then insist that what he has paid as annuity was not such, but merely consideration money paid back by instalments. But courts of law undoubtedly hold at this day, that when an action is brought to recover the consideration money given for an annuity, which has been set aside, the defendant shall be allowed to deduct the payments made under the annuity. It has been so decided at law, and also by Lord *Rosslyn*, sitting in a Court of Equity. Accounting, in this sort of case, is indeed a pure matter of law. Lord *Alvanley* also seems to have acceded to the right of calling for an account in equity ; but to have taken it up from the filing of the bill instead of from the commencement of the transaction. He did so, upon the principle that this was a case for redemption, which presupposes the annuity deed to

Bromley
v.
Holland,
Tyrrell, and
Oakden.

be valid, in which the clause of redemption is contained ; whereas I am at a loss to conceive how a decree is to be founded upon a clause of redemption contained in a deed, which deed must be admitted to be null and void to all intents and purposes. In administering the relief then as between grantor and grantee, I have difficulty in this, as to what is to be done with any surplus that may be in the grantee's hands : it is said that being voluntary payments they shall not be recovered back. Is this upon any principle arising out of the policy of the act ? If it is not so, it seems to me difficult upon legal principles to find the distinction in favour of the right of recovering back payments in one case, and against it in the other. But the difficulty has occurred in equity, in the case of *Byne v. Potter*, in which there actually was a surplus in the hands of the grantee, but the court did not order it to be repaid ; but the defendant admitting that he had received more than was due to him for principal and interest, the decree merely was, that the securities should be delivered up to be cancelled.

How is the case then as between the grantor and the assignee ? I think he stands in the place of the grantee, and, as such, is entitled to the full sum of 600*l.* the original consideration paid for the annuity. The judgment at law, by the defendant *Holland*, must be in the name of *Gratthead* ; so in this court if any proceeding is directed to be had upon the bond ; so at law upon the covenant. In equity, the assignee is entitled to these rights, and I think it cannot be contended that there is any substantial difference between the grantee and the assignee. I think, that even at law, the original consideration, and not that of the assignment, must be taken to be the footing of account, so that if this annuity

[24]

Bromley had been set aside upon a third application, the account must have been taken upon what *Greathead* paid to *Bromley*, as the price of the annuity, and not upon what his assignee paid to him. Therefore, if the assignee paid more he could only have the original consideration allowed him; and which case might happen: for an annuity might be assigned for more money than it originally cost, from the circumstance of the grantor having become healthier and stronger by the time when the annuity was assigned, than he was when he originally granted the annuity.

As to the confirmation there is nothing in that objection; the grantor had no notice of the defects; and I do not see how a deed, which is null and void, is capable of confirmation.

I am, therefore, clearly of opinion, that the decree at the *Rolls* is wrong; that the account must be taken of all payments made of the annuity from the original grant of it, instead of from the filing of the bill; this not being a case for relief upon the principle of redemption as reserved by the deed, but upon the principle of the deed being void to all intents and purposes, and consequently that there never was an annuity capable of being redeemed. The defendant *Tyrrell* must have his costs, as unnecessarily brought to a hearing. In *Byne v. Vivian*, Lord *Rosshyn* gave the principal defendant his costs of the suit; but not in *Byne v. Potter*, because the defendant there admitted that the annuity there had been satisfied. In cases of redemption a defendant has costs; but I doubt whether he also has in a case of usury. In the present case, which is a case of great difficulty, almost of the first occurrence, and in which I am reversing a

decree made by a most respectable judge, and defended by powerful arguments, I cannot, therefore, give any costs whatever to the plaintiff. The relief, therefore, must be without costs as between the plaintiff and the defendant *Holland*. The other defendants, *Oakden* and *Tyrrell* must have their costs; and as *Oakden* must account to the plaintiff for part of the rents and profits received by him in consequence of this annuity being void, I think that even the necessity for such an account against *Oakden* would support the jurisdiction of the court.

Bromley
v.
Holland,
Tyrrell, and
Oakden.

His Lordship added, that this being a case of great difficulty he would himself pen the decree; which he did, and it was as follows:

Reg. Lib. A. 1801, } “ Let the decree, bearing date
fol. 514. } “ the 14th day of July, 1800, be
“ reversed, and refer it to the master to take an account
“ of the consideration or considerations paid by Samuel
“ Greatheed, on the purchase of the annuity or annui-
“ ties granted to him by the plaintiff by the deed or
“ deeds, bearing date respectively the 16th day of May,
“ 1788, together with interest at 5l. per cent. upon the
“ same; and also to take an account of the payments
“ made by the said plaintiff, or on his behalf, upon ac-
“ count of such annuity or annuities to the said Samuel
“ Greatheed, or to the order, or upon the account of
“ any person or persons claiming under him by assign-
“ ment or otherwise, including the defendant, Arabella
“ Holland: and let such payments as the same were
“ made from time to time be applied, first in discharge
“ of the interest, and then of the principal of such con-
“ sideration or considerations; and in case upon the ta-

[26]

Bromley
v.
Holland.
Tyrrell, and
Oakden.

“ king of such account such consideration or considera-
 “ tions, with interest, shall appear to have been fully re-
 “ paid, let all deeds, granted for securing the said an-
 “ nuity or annuities, other than the deed of the 1st day
 “ of June, 1795, be delivered up to be cancelled, and
 “ let satisfaction be entered upon the record of the judge-
 “ ment. And the defendant, Richard Oakden, is with-
 “ out costs, to account with the plaintiff for, and pay
 “ to him the surplus rents of the premises comprised in
 “ the deed of the 1st day of June, 1795, after satisfac-
 “ tion of the payments, other than those thereby di-
 “ rected to be made to the said defendant, Arabella
 “ Holland; such surplus rents to be accounted for
 “ by the said defendant, Richard Oakden, from the
 “ time from which it shall appear that such principal
 “ and interest as aforesaid was satisfied as aforesaid,
 “ and from which it shall appear that he shall have had
 “ notice of the plaintiff’s claim, but not beyond the time
 “ of filing the bill. And in case any thing on taking
 “ such account as aforesaid shall appear to be remain-
 “ ing due from the plaintiff, then the plaintiff is to pay
 “ the same to the said defendant, Arabella Holland, as
 “ and when the master shall appoint; and upon such
 “ payment, such deeds shall be delivered up, and such
 “ satisfaction be entered, and such payment be thence-
 “ forth made by the said defendant, Richard Oakden,
 “ as herein before mentioned. And in case the plaintiff
 “ shall make default in such payment, the plaintiff’s
 “ bill is to be dismissed, with costs, to be taxed by the
 “ Master, and to be paid to the defendant, Arabella
 “ Holland: and in either case the plaintiff is to pay un-
 “ to the defendant Tyrrell, and to the defendant Oakden,
 “ their costs of this suit, to be taxed by the Master, and
 “ until such accounts are taken, and if any thing shall

"appear to be due thereon to the said defendant, Arabella Holland, until such default of payment as aforesaid, all proceedings at law by the defendant, Arabella Holland, either in her own name, or in the name of any other person or persons under whom she claims, are to be stayed by injunction. And for the better taking the aforesaid accounts, the parties are to produce, before the Master, all books, papers, and writings in their custody or power relating thereto, and are to be examined upon interrogatories, as the Master shall direct, who in taking the said account is to make unto the parties all just allowances. And in case the plaintiff shall make default in such payment as aforesaid, let the sum of 10*l.* deposited by him with the Register be paid to the said defendant, Arabella Holland; but in case the plaintiff shall not make such default, let the deposit be returned to him."

Bromley
v.
Holland,
Tyrrell, and
Oakden.

WAKERELL *versus* DELIGHT and Wife.

Lincoln's
Inn Hall.
July 23, 1802.

MR. CULLEN moved that the defendant, who was a mortgagor in a suit by plaintiff, the mortgagee, to foreclose, and who had petitioned and obtained an order under the act 7 *Geo. II. c. 20.* to refer it, in the first instance, to the Master to take the account of what was due to the plaintiff, for principal, interest, and costs, on his security, (the Master reporting 53*l.* to be due, and ordering it to be paid by the 25th September next,) might have farther time, till the 25th March, 1804, upon the usual affidavit of having endeavoured in vain to sell the premises, and of there being sufficient and ample security.

Mortgagor applying for time after having obtained the order under 7 *Geo. II. c. 20.* need not have his money ready as at law.

Wakerell
v.
Delight and
Wife.

Mr. *Cooper* opposed the motion upon the ground that the court had no authority, under the act of parliament in such a case to enlarge the time, the act providing for the case of mortgagors who had their principal, interest, and costs ready to pay, provided they could be relieved from the delay and expense of a suit. It declares that courts shall have power to stay the proceedings in them upon such payment; but the payment is a condition. At all events the defendants, after getting this short order, could never have nine months more time allowed them.

Lord *Chancellor* at first thought the court had no authority; but afterwards changed his mind, upon looking into the act, considering that in suits of foreclosure, a court of equity was enabled to make the same order, &c. as upon a formal hearing, and afterwards act the same as in cases of that sort. He, therefore, gave the defendants till the first day of *Hilary* term, upon their undertaking to pay the interest and costs now due, and referred it back to the Master to compute subsequent interest and costs.(1)

(1) The court, in England, is very indulgent in enlarging the time to redeem. In *Edwards v. Cunliffe*, 1 Mad. Rep. 287. a fourth order for enlarging the time of payment six months was made, upon strong affidavits of the property being of far greater value than the amount due; that a sale had been made, and difficulties respecting the title alone prevented its completion, which it was expected would be removed.

I. & T. LITHGOW *versus* LYON, EARLE, and others.

Rolls.
May 29, 1805.

THIS came on, upon an application by the plaintiffs, to rectify the minutes of a decree; and the question was, whether the defendants, Lyon and Earle, were entitled to interest upon a demand of 1000*l.* for which a promissory note of 1000*l.* given by the plaintiffs to Langston and Gafney, had by them been endorsed to the defendants, Lyon and Earle.

Interest given
on a note of
hand from the
time of its be-
coming paya-
ble. (1)

It appeared that the plaintiffs had received no consideration for the note; but had deposited it with Langston and Gafney, as a security for the good conduct of a young man placed with them in a situation of trust. Langston and Gafney, being pressed by their creditors, endorsed the note to Lyon and Earle. Langston and Gafney, after endorsing the note to Lyon and Earle, wished to get it back again, and sent other bills, requesting the note to be delivered up. Lyon and Earle, doubting the goodness of the second bills, kept both. They had received sums of money upon the second set of bills, and the plaintiffs had filed their bill in this court, praying to have the note delivered up upon plaintiffs paying what the defendants had remaining due to them, in respect to their debt of 1000*l.*

The decree directed an account to be taken of what was due in respect to the 1000*l.* debt, and also of what the defendants, Lyon and Earle, had received; and upon plaintiffs paying what remained due in respect of

(1) *S. P. Upton v. Ferrers*, 5 Ves. 801. *Lowndes v. Collins*, 17 Ves. 27.

Lithgow
v.
Lyon,
Earle, and
others.

the note and interest, then defendants were to deliver up the note and assign the second set of bills, and their right to receive future dividends thereon, (the parties having become bankrupts.)

[30]

Mr. Richards, and Mr. Agar, contended, that the debt being simple contract, did not carry interest; and that the note being afterwards deposited as a security for it, could not make it carry interest.

Mr. Romilly, and Mr. Cooper.—Negotiable securities universally carry interest from the time they become due.

The Master of the Rolls directed the minutes to be altered, by ordering the Master to inquire whether the debt carried interest from the first, and if not, then to compute interest on what remained due of the debt at the time the note became payable. He said, that the plaintiffs had it in their power, by taking up the note before it was due, to avoid interest; but as they did not do so, interest at that time attached, otherwise the note was of no use.



Lincoln's
Inn Hall.
Dec. 19, 1805.

ATTORNEY GENERAL *versus* THE CORPORATION OF CARMARTHEN.

Information
against a cor-
poration, sta-
[31]
ting that they
were seized of
real estates
partly for pur-

THIS was an information, stating, that the corporation was seized of real estate for purposes of public utility; and of other real estates in trust for private charity; and that the defendants had sold part of the first mentioned estates, and were selling the remainder; and

charging a general misapplication of the funds, and abuses of the charity; and praying an injunction to restrain the first, and the court's regulation of the latter.

Attorney General
v
The Corporation of
Carmarthen.

The defendants demurred for multifariousness.

Lord Chancellor.

The two things don't hang properly together. Even with regard to the misapplication of the corporation's own money, I think this court cannot interfere. I know that Mr. Justice Buller(a) thought that this court had jurisdiction in a case of a corporation's misapplying

poses of public utility, and other part in trust for private charity; and charging a general misapplication of the funds and praying relief accordingly: a demurrer for multifariousness was allowed.(1)

(a) *King v. Watson* and others, 2 Term Rep. 200.

(1) In *Harrison v. Hogg*, 2 Ves. 323. a demurrer for joining a joint and several demand in the same bill was allowed.

In *Rayner v. Julian*, Dick. 677. the Master of the Rolls admitted a demurrer would lie for multifariousness, as in a case of an estate sold in lots to different persons, one bill for specific performance would be objectionable.

In *Ward v. Northumberland*, 2 Anst. 469., the plaintiff was tenant to the father of the two defendants, under a lease of a colliery, and subsequent agreements, under which certain allowances were to be made to them for refraining from certain acts. He continued under the heir upon the same terms, and now filed his bill against the two as executors of his father, and the one as heir, for an account and payment of the sums due under the agreement. A demurrer for being joined in a bill for such separate and distinct claims was allowed.

The case of *Harrison v. Horne* was mentioned by counsel.—Two plaintiffs being jointly concerned in two transactions in the bill, but quite unconnected on two others, on demurrer, the court were of opinion against the bill. It was, however, said on the other side, that that case was not yet decided.

Attorney General v. The Corporation of Carmarthen. its funds ; but we have never been told how it is to proceed. The best thing I can do is to allow this demurrer, not giving leave to amend.

*Lincoln's
Inn Hall.
Jan. 20, 1806.*

PRICE *versus* WILLIAMS, and others.

THIS was a bill by an infant, against the trustees and executors of her father, praying an account of real and personal estates, the appointment of a guardian, receiver, and maintenance.

A receiver cannot be appointed without mortgagee's being before the court, if a mortgagee appears upon the face of pleadings. (1)

I moved for a receiver upon the answers of the trustees and executors, showing a misapplication of the per-

(1) In *Phipps v. Bath*, Dick. 608. Lord Thurlow refused to appoint a receiver on the application of a second mortgagee, the first declining to take possession, or to have a receiver appointed. He observed, it could not be done, the mortgagor being living, without consent of first mortgagee, because the court could not prevent the latter bringing an ejectment against the receiver as soon as appointed.

In *Bryan v. Cock*, 1 Cox's Cas. 422., however, the court appointed a receiver on the application of creditors, the mortgagee not being in possession, but without prejudice to his right to take possession.

It is true, the mortgagor was in this case dead, but the reason of Lord Thurlow seems scarcely satisfactory. If the mortgagee thought proper to bring his ejectment, and recovered possession, the court would then charge him with the rents in reduction of his mortgage, and thus the second mortgagee would be relieved. But why his power to do this is a reason for refusing the appointment of a receiver until he exercise that power, does not seem clear. The second mortgagee suffers a loss, if the security is defective from the neglect of the first.

sonal estates, in incurring an expense of 500*l.* for a funeral feast in Wales, the personal estate not being sufficient to pay debts: and 2dly. a violation of the rule that a trustee to sell shall not buy, which the defendant Jones had done, he alone managing the real property. The real estate was not charged with payment of debts; but the testator had directed the rents and profits to be applied in paying of what he owed to one Gore, who in the answers was stated to be a mortgagee for 16,000*l.*

Price
v.
Williams and
others.

[32]

Mr. Owen opposed the motion, upon the ground that the mortgagee not being before the court, the order could not be made, and stated that his honour, in a late case, had so decided.

I replied, that the bill prayed no relief against him, and that it would be sufficient to undertake to give him notice of the appointment, but his honour refused the motion.

BARKER *versus* HARPER.

June 16, 1806.

MR. JOHNSON moved to pay the purchase money of an estate into court, and to be let into the possession and receipt of the rents from Christmas day last, upon an affidavit that he had been ready to complete his purchase, and had his money ready ever since, lying dead in a banker's hands.

Purchaser under a decree of the court is not entitled upon an affidavit that he has had his money lying ready for some time, to be let into possession of estate, and receipt of rents for all such time so passed. (1)

(1) See 3 Ves. 502., and 1 Turner's Practice, 223.

Barker
v.
Harper.

Mr. Hart, and Mr. Cooper, *contra*.

You should have moved to pay the money into court when it would have been laid out. This, if done by special application, would not have been an acceptance of the title.

[33] The *Chancellor* was of the same opinion, and ordered the party to be only let into the receipt of the rents from Lady day last past.

Rolls.
Ap. 21, 1807.

LANGSTON, and others, infants, *versus* OLLIVANT and others.

Power to
lend trust mo-
ney upon real
or personal
security, does
not enable
trustees to ac-
commodate a
trader with a
loan upon his
bond.(1)

THIS was a bill against the defendants, as trustees, to make them personally responsible for the loss of 500*l.* lent by them upon bond to R. Langston, the plaintiff's father, who had become since bankrupt. The case was, that John Ollivant, deceased, by his will left a legacy of 1000*l.* to his daughter Betty, and 500*l.* to the defendants, in trust, to place out the same upon real or personal security as should be thought good and sufficient, to the use of his daughter for life, and afterwards to and among her children; and he declared that his said trustees should not be answerable for any loss which might happen without their wilful neglect or default. Upon the marriage of Betty Ollivant with John Langston, the defendants, the executors, lent him the

(1) See *Wilkes v. Steward*, ante, 6. *Adye v. Feuilletau*, 1 Cox's Ca. and note.

500*l*. in question, upon his bond, and they also, at the same time, lent him 600*l*. of their own money, upon the same security. Evidence was given that John Langston, at the time of his marriage, and of the said loans, was a trader in good credit and circumstances, and that it was not till some years afterwards that he failed.

Langston and
others
v.
Ollivant and
others.

Mr. Leach and Mr. Cooper, for the plaintiffs.

Defendants must be liable for a breach of trust : 1st. they lent the money to a man in trade, of course made this trust property liable to all the contingencies of trade : 2ndly. they lent it to a person who evidently was not a man of property by his requiring another loan of 600*l*. The court has before charged executors with a loss by not calling in a bond debt. Where a testator has himself chosen that security, it is harder upon executors to make them answerable for a loss in that case, than where they take upon themselves to lend money upon such security, cited 2 *Bro.* 156. 5 *Ves.* 839.

[34]

Mr. Wetherell, for defendants.

The executors had the power of lending upon personal security given them by the will, and a clause of indemnity in case of loss. There can be no stronger proof of their believing the security good, than that of lending their own money upon it.

His honour thought that the authority given them did not extend to an accommodation, which was what had here taken place. It was evident that the defendants had upon the marriage been induced from relationship to accommodate the bankrupt with this loan, which his

Langston and
others
v.
Ollivant and
others.

honour thought they had no power to do ; and, therefore, he was of opinion that they must be responsible for the loss.

HITCHINS *versus* LANDER.

Jy. 28, 1807.

Plea of the
stat. 32 H.
VIII. c. 9. s. 3.
against buying
and selling
pretended
titles: and
[35]
also that there
was not any
mortgage as
mentioned in
the bill; to a
bill that the
defendant
might redeem
a mortgage,
upon a cove-
nant in a lease
from the de-
fendant to the
plaintiff: held
good, though
a negative
plea.(1)

THE defendant having a claim to an estate, then depending in chancery, under a limitation in a will, granted a lease thereof to the plaintiff. The defendant afterwards wished to get rid of the conveyance. The plaintiff thereupon filed a bill against the defendant, stating himself to be tenant to the defendant of the premises in question under the lease, and alleging that the defendant had given notice to the tenants not to pay their rent to the plaintiff. The bill prayed a discovery of the lease and notice, and that the defendant might be compelled to proceed to a redemption of a mortgage on the premises made to James Halse, or to procure to the plaintiff an assignment thereof; and to come to an account with the plaintiff with respect to rents and profits of the premises, and to deliver up the possession.

The defendant, Lander, first demurred generally, for want of equity; which demurrer, upon argument, was overruled.

A second demurrer by him, because the said James Halse, the alleged mortgagee, was not a party to the suit, was also, upon argument, overruled.

(1) See *Gun v. Prior*, 1 Cox's Ca. 197. and note.

The same defendant, thirdly, put in a plea to part of the said bill, and which was as follows :

Hitchins
v.
Lander.

Plea.—"As to so much of the said bill as prays a
"discovery of any lease, made or supposed to be made
"between the said defendant and the said plaintiff, of
"any part of the lands, tenements, and hereditaments,
"of or to which the said defendant was, or pretended
"to be so seized or entitled, as mentioned in the bill,
"and of any notice in writing given, or supposed to be
"given, by the said defendant to the tenants then in
"possession of the said premises, or of any part thereof,
"or any of them; the defendant doth plead and for plea
"saith and doth aver, that by the statute made and
"passed in the thirty-second year of the reign of his
"late majesty king Henry the VIIIth. chap. 9. sect. 2.
"against bracerie and buying of titles: It is enacted,
"that no person or persons of what estate, degree, or
"condition soever, he or they shall be, shall from
"thenceforth bargain, buy, or sell, or by any ways or
"means obtain, get or have any pretended rights or ti-
"tles, or take, promise, grant, or covenant to have any
"right or title of any person or persons, in or to any
"manors, lands, tenements, or hereditaments, except
"such person or persons who shall so bargain, sell, give,
"grant, covenant, or promise the same, their anteces-
"sors or they, by whom he or they claim the same,
"have been in possession of the same, or of the rever-
"sion or remainder thereof, or taken the rents or profits
"thereof by the space of one whole year next before
"the said bargain, covenant, grant, or promise made;
"upon pain that he that shall make any such bargain,
"sale, promise, covenant, or grant, do forfeit the whole
"value of the lands, tenements, or hereditaments, so
"bargained, sold, promised, covenanted, or granted.

[36]

Hitchins
v.
Lander.

[37]

“ contrary to the form of the act, and the buyer and taker thereof, knowing the same, to forfeit also the value of the said lands, tenements, or hereditaments, so by him bought or taken ; and the half of the said forfeitures to be to the king, and the other half to the party that will sue for the same in any of the king’s courts of record, by action of debt, bill, plaint, or information, in which action, bill plaint, or information, no essoign, protection, wager of law, nor injunction shall be allowed. And the defendant doth aver, that he had not, according to the best of his knowledge and belief, his antecessors, or they by whom he or they claimed the said lands, tenements, and hereditaments, or any of them, had not been in the possession of the same, or any part thereof, or the reversion or remainder thereof, by the space of one whole year next before the lease and grant charged and inquired after by the said bill ; neither was the plaintiff then in lawful possession by taking of the yearly farm rents or profits, of or for the said lands, tenements, hereditaments, or any part thereof. And the said defendant doth plead the said statute, and that the making such discovery may tend to subject the said defendant, not only to the forfeiture of the value of the said lands, tenements and hereditaments, by the said bill charged to have been so granted and demised as therein mentioned ; but also to make the said defendant liable to the pains and penalties incurred by unlawful maintenance at the common law ; and the said defendant humbly prays the judgment of this court whether he ought to be compelled to make any farther or other answer to such part of the said bill as he hath before pleaded to. And to such part of the said bill as seeks any decree against the said defendant to compel him to proceed to a re-

“demption of the mortgage supposed to have been here-
 “tofore made of the said premises by the said defend-
 “ant to James Halse, in the bill named, or to procure
 “for the said plaintiff an assignment thereof, and to
 “come to an account with the said plaintiff in respect of
 “the rents and profits of the said premises, and to deli-
 “ver up the possession thereof to him; the said defend-
 “ant doth plead thereto, and aver that no part of the
 “said premises ever was, or is now, subject to any
 “mortgage thereof, made by the said defendants to the
 “said James Halse.”

Hutchins
 v.
 Lander.

Sir *Samuel Romilly* and Mr. *Hall*, in support of the plea, cited *Co. Lit.* 369, *a.* to show that a lease for years was clearly within the meaning of the statute. *Sharp v. Carter*(*a*) was a case in this court upon the same statute, against giving the discovery. *Leigh v. Helyar*(*b*) a case in the star chamber had also decided, that in such a case the party was liable, after the year and day had expired, to the pains and penalties of maintenance at common law, though he could not be sued under the statute after that time. As to the latter part of the plea, which is, that no part of the said premises ever was nor is now subject to any mortgage thereof, made by the defendant to the said James Halse, it is good, though a negative plea. A negative plea may be good if it reduces the plea to a single point. *Plomer v. May*.(*c*) *Hall v. Noyes*;(d) in which last case lord Thurlow admitted that he was mistaken in before holding that a negative plea was bad. That a plea of “not heir” was good at law appeared by the statute of Westminster the

[38]

(a) 3 *P. Wms.* 375.

(b) *Moore's Rep.* 751.

(c) 1 *Ves.* 426.

(d) 3 *Bro. C. C.* 489.

Hitchins
v.
Lander.

second, (a) which recites, that in a plea of mortdauncestor, the tenant might plead that the plaintiff is not next heir of the same ancestor by whose death he demanded the land, and enacts, that in writs of cosinage, aiel, and besaiel, which are of the same nature, that plea shall also be admitted. Pleas in this court are of the same nature as pleas at law.

Mr. *Hart* and Mr. *Bell*, argued against a negative plea, as not permitted in this court. In a case (b) in equity, where "not heir" was pleaded, it was overruled.

The *Lord Chancellor*, (after consideration,) thought the plea was good, and allowed the same; but gave the plaintiff leave to amend his bill. *Reg. Lib. A. 1806*, fol. 1290.

[39]

EDWARDS *versus* HARVEY.

Rolls.
June 6, 1809.

Hand writing
of a relation
deceased re-
jected as evi-
dence of pe-
digree.

THIS was a bill for a specific performance of an agreement for the sale of an estate.

On the part of the defendant, the purchaser, an objection was taken to the title, that A. B. from whom the plaintiff claimed, was not proved to be related to C. D., who was the granting party in the conveyance to the plaintiff.

(a) *Stat. 13 Ed. 1 c. 20.* (b) *Gunn v. Prior, 2 Dick, Rep. 657.*

An issue being directed, the jury found for the defendant.

Edward
v.
Harvey.

A motion being made for a new trial, the question was, whether a paper, offered to be produced as evidence on the part of the plaintiff, and which Mr. Baron Graham had rejected at the trial, ought to have been received in evidence. It was a pedigree drawn out by Bridget Lloyd, a maiden lady, deceased, showing that C. D. who was her relation, was related to A. B. It was made after the doubts arose as to the pedigree; but she herself was dead, and it was found amongst her papers.

Mr. Sergeant *Williams*, Mr. *Abbott*, and Mr. *Bell*, for the plaintiff,

Contended, that as she, if alive, might have been examined by releasing, therefore this paper was admissible. If that which had been spoken as hearsay is evidence, why should not that which is written?

Mr. *Richards*, Mr. *Dauncey*, Mr. *Taunton*, and Mr. *Cooper*, for the defendant.

Nobody shall make evidence for himself. Mrs. [40]
Bridget Lloyd had an interest in establishing a relationship. Cited 13 *Ves.* 514. *Salk.* 283.

His Honour refused the new trial, because, if Mrs. Bridget Lloyd's pedigree, written by herself, were evidence for her relation, so would her declaration have been evidence to show that she was herself entitled to the estate.

June 8th.

Rolls.
Feb. 9, 1810.

SAME CASE.

Vendor not making a good title ordered to pay costs, though he was only a trustee to sell.

THIS cause afterwards coming on for farther directions and costs, Mr. *Richards* and Mr. *Cooper* argued that the bill must be dismissed with costs. The general principle is, that if the title proves good, the purchaser must pay costs; and if the title proves bad, he must have them. The Master of the Rolls acted upon that principle in *Bishop of Winchester v. Paine*.^(a) The question as to a purchaser receiving costs arises two ways: 1st. Where he is plaintiff, and a strong case is then necessary to deny him costs, if the vendor cannot make a title. 2d. Where he is defendant, and being passive in such case, a much stronger still is necessary. In *Vancouver v. Bliss*^(b) the purchaser's taking possession under the representation that a title could be made was insufficient to exclude him from costs.

Here the defendant had offered to take the title if a bond of indemnity was given him. There is no doubt but that at law he would recover his costs.

[41]

Sir *Samuel Romilly* and Mr. *Bell* argued, that the title being bad, only makes a *prima facie* case for costs. Here the defendant had made numerous objections, and though he had succeeded in one, that was not enough to entitle him to costs for the rest.

Mr. *Richards*, in reply. As the report was for the defendant, he could not except to the Master's opinion as to the objections he disallowed.

(a) 11 *Ves.* 194.

(b) 11 *Ves.* 458.

His Honour. The title in a suit being bad only makes a *prima facie* case for costs. In many cases circumstances outweigh that. Though the plaintiffs are trustees to sell, the defendant has nothing to do with the character in which they stand; he is ignorant of that when he buys. As to the objections overruled, they might have been very properly made, though an answer was given to them, or they were removed; and the purchaser has no opportunity of canvassing the Master's judgment as to them, where the report is in his favour.

1810.
Same Case.

Bill dismissed with costs.(1)

BUXTON and PARNHAM *versus* MONKHOUSE.

In *Lincoln's Inn Hall*.
Feb. 27, 1810.

SIR *Samuel Romilly* and I moved that the order appointing a receiver in this cause might be discharged.

The property tax act, 46 Geo 3. c. 65. s. 112. and 115. in declaring [42] ing covenants to pay the same void, has a retrospective operation: therefore covenant entered into before the act passed, void. Receiverought not to be appointed where there is a trustee with power of entry and distress.

By indenture of the 12th March, 1805, the defendant granted an annuity of 50*l.* a year to the plaintiff Buxton, secured on leasehold property comprised in his marriage settlement, with power of entry and distress, and a covenant from grantor not to deduct the property tax. The annuity being in arrear, the plaintiffs filed this bill; and got a receiver appointed on an *ex parte* proceeding. By the answer, since put in, it appeared that the defendant had, before the bill filed, tendered

(1) The objections taken by the purchaser may be of such weight as to entitle him to the opinion of the court, and then he does not pay costs, though they prove insufficient.

Buxton and
Parnham
v.
Monkhouse.

the arrears due, deducting the income or property tax of 10% per cent. which had been refused.

We argued, that an annuity was within the meaning of the act, and particularly comprised in s. 112. and 115. of 46 Geo. 3. c. 65. and that by the latter section the covenant, though prior in date to the statute, was made void, the words being "made or entered, or to be made or entered," which were clearly retrospective.

Mr. Agar, *contra*.

The Lord Chancellor.

I think this receiver improperly appointed: the plaintiff Buxton having a trustee with power of entry and distress on the leasehold estates. Indeed, I have often thought it dangerous ever to appoint a receiver *ex parte*.

As to the act, I think the defendant has a right to make the deduction in question; but let the motion stand over to furnish me with an affidavit as to what rents have been received, or are due.

Receiver discharged.

[33]
In Lincoln's
Inn Hall.
Dec. 7, 10, &
11, 1811.
Before Lord
Eldon.

TONKIN *versus* SIR JOHN LETHBRIDGE.

THIS was a bill filed by the plaintiff as heir at law *ex parte materna*, of the mortgagor, praying a redemption
Heir at law
filing a bill to
redeem a

tion. The defendant by his answer denied that the plaintiff was such heir at law. The plaintiff thereupon amended his bill by stating, that, "in and previously to the month of January, 1803, James Kekewich having set up a claim to the estate in question, as heir at law of the mortgagor, and thereupon by deeds of lease and release, dated in the said month of January from the said James Kekewich, to plaintiff duly executed by the said James Kekewich, for a good and valuable consideration paid by plaintiff, the said James Kekewich, by sufficient words effectually granted, conveyed and assured all the said estates and premises, with the appurtenances thereof, unto and to the use of plaintiff and his heirs:" and no farther answer was put in by the defendant, none being required of him. At the hearing, an issue was directed to try whether the plaintiff was such heir at law, and it was found that he was not.

Tonkin
v.
Sir John
Lethbridge.

mortgage, having also brought in the claim of a third person to the heirship; if he himself is found upon an issue not heir, he cannot by supplemental bill have the benefit of the original suit, as the purchaser of the heirship in such third person. On demurrer to supplemental bill.

The plaintiff then filed a supplemental bill, stating that by indenture of release and confirmation, dated the 9th April, 1811, Kekewich had granted, released, ratified, and confirmed the said estate to plaintiff, and praying that he might be declared entitled to the redemption and conveyance prayed by the original bill. To this supplemental bill the defendant demurred to the discovery and relief; because it did not appear by such supplemental bill that any new matter had arisen since filing the original bill in the cause, which was properly matter of supplement, and because it appeared by the said supplemental bill that the plaintiff claimed to be relieved touching the matters in the said supplemental bill mentioned, by virtue of the purchase of a certain

Tonkin
v.
Sir John
Lethbridge.

pretended title, and which purchase, if any such was made, was contrary to law.

Sir A. Piggot, Mr. Richards, and Mr. Hall, for the Bill, cited Lord Redesdale 59. ; and *Jones v. Jones*, 3 Atk. 110.

Sir Samuel Romilly, Mr. Hart, and Mr. Bell, for the demurrer.

The Lord Chancellor.

To entitle a plaintiff by a supplement bill to the benefit of former proceedings, it must be, in respect of the same title, in the same person, as stated in the original bill. If in the present case, the title now relied on was sufficiently stated in the original bill, that is ground for a rehearing of the cause : if it is not, then any third person, as well as the plaintiff, might file a supplemental bill. If two original bills had been filed to redeem, one by the present plaintiff, and the other by Kekewich, and then the issue at law was found in favour of Kekewich, whereupon the plaintiff had bought Kekewich's title, it is clear that the purchase should be stated by supplemental bill in Kekewich's suit, and not in the present plaintiff's. If I do not mention the case on Tuesday, it is to be considered that the demurrer is allowed.

His Lordship mentioned it, and gave again pretty much the same reasons for allowing the demurrer ; but without prejudice to plaintiff's filing an original bill.

MILLAR *versus* HORTON.DISNEY *versus* HORTON.*Rolls.*
Mar. 4, 1812.

BILL by special creditors against executor and trustee to be paid a debt of 8000*l.* out of personal estate, as far as it would go, and the residue out of real estate.

A direction in a will to pay simple contract creditors before specialty ones, is not void; being within the exception in the statute of fraudulent devises.

The testator by his will had directed his personal estate to be applied, in the first place, in the payment of debts out of his family and to strangers, and his real estate to be sold, and simple contract creditors to have a preference, and then to pay specialty creditors.

The second cause was instituted by simple contract creditors to be paid according to the directions of the will, or if not, then *pari passu*.

Mr. Hart, and Mr. Cooper, (the legality of the administration directed of the personal estate being given up) argued, that the direction to pay simple contract creditors was void, not being within the exception in the statute of fraudulent devises. *Vernon v. Vaudry*, in *Bernard*. 304, and which the Register's book confirms, held a devise to pay debts, excepting a debt as surety, was not within the proviso of the statute.

Sir Samuel Romilly and Mr. Wilson. This is within the exception, being for payment of debts. Here it is for payment of *all* debts, not excepting any. *Vernon v. Vaudry* contained an exception.

His Honour thought this devise satisfied the words of the proviso, being for payment of debts.

June 10, 1812.

STABBACK *versus* LEATT.

Plea (to a bill to redeem a mortgage,) of a conveyance by the mortgagor of the equity of redemption, in trust to sell and pay the mortgage, and a bond debt from him and two other persons, and a conveyance from the trustee to the mortgagee, nobody offering at an auction so much as was due for the mortgage money with interest and costs: ordered to stand for an answer with liberty to except.

THE bill stated, that in 1760, Samuel Stabback and Mary his wife, executed a mortgage, either in fee, or for some term of years, to Elizabeth Leatt, the sister of the defendant, for securing the sum of 200*l.* with interest. Samuel Stabback died intestate in 1770, leaving the plaintiff his heir at law. In 1790 Elizabeth Leatt took possession, and shortly after died, leaving the defendant entitled under her will to the said mortgage. Mary Stabback, the plaintiff's mother, also died. The bill charged that the defendant and his sister, in her life time, always treated the estate as redeemable, and kept the accounts thereof; and that about two years before filing the bill he had acknowledged to the plaintiff that he had only a mortgage title, and submitted to be paid off. The prayer of the bill was for a redemption.

The defendant put in a plea to the said bill, and thereby stating, that by indenture, dated the 6th July, 1765, after reciting, that by deed of the 20th March, 1762, Samuel Stabback mortgaged to Hannah Hall the premises for one thousand years, to secure 150*l.*, it was witnessed, that in consideration of the said 150*l.* paid by William Holwell to Hannah Hall, and of 50*l.* to Samuel Stabback, the said mortgage was assigned to him William Holwell, to secure 200*l.* with interest. That by indenture of the 4th January, 1769, reciting, that by articles before the marriage of Samuel Stabback and Mary his wife, it had been agreed, that of a sum of 300*l.* to which she was entitled as her fortune, the said Samuel Stabback should receive 100*l.* for his own use,

Stabback
v.
Leatt.

and the remaining 200*l.* be settled upon the said Mary, and that the said Samuel Stabback, upon receipt of the said 100*l.* was on his part, in return also to settle certain premises upon her; and reciting that the said Samuel Stabback had not received the said 100*l.* and that he had sold and disposed of the said premises; it was witnessed, that upon payment of 230*l.* to the said William Holwell, so much then being due to him for principal and interest upon his said mortgage, and which 230*l.* was so paid off by and out of the said trust sum of 300*l.* the said William Holwell thereby assigned, and the said Samuel Stabback confirmed, unto John Holwell and John Stabback, the said premises and the said term in trust for the said Mary Stabback's separate use for life, remainder as she should appoint by will or deed, in default of appointment for their children, and if no child, for her executors, administrators and assigns.

That by indenture of the 26th March, 1773, George Stabback and John Holwell, together with Samuel Stabback and Mary his wife, transferred the said mortgage to Elizabeth Leatt, to secure 200*l.* lent and advanced by her, with interest, and the equity of redemption was thereby reserved to Samuel Stabback and Mary his wife. That by indenture of the 12th August, 1774, reciting the said mortgage, and that John Holwell and Gilbert Langdon had joined Samuel Stabback as security for him in a bond to Elizabeth Leatt for 40*l.* the said John Holwell and George Stabback, together with Samuel Stabback and Mary his wife, conveyed their interest in the said premises to William Hobbs and Gilbert Langdon upon trust for sale of the said premises, and to apply the money arising therefrom in payment

Stabback
v.
Leatt.

[48]

of the said 200*l.* mortgage money, and also the said bond for 40*l.* and then to pay the residue to Mary Stabback's separate use. That by indenture of the 26th April, 1796, Ann Hobbs, the widow and executrix of William Hobbs, (which William Hobbs had survived the said Gilbert Langdon,) after reciting that there was then due to the defendant John Leatt, as representative of the said Elizabeth Leatt, 370*l.* for principal and interest on the said mortgage, being more than the value of the said premises, and that at an auction, which had been held, no person would bid so much for them; the said defendant, in compliance with the request of the said Elizabeth Leatt, had agreed to assign the premises and the moneys due thereon for principal, interest, and costs, to his daughter Eleanor Leatt, and had requested the said Ann Hobbs to join in the same assignment: she the said Ann Hobbs, therefore, in consideration of 5*s.* and the said John Leatt in consideration of natural love and affection, assigned and transferred to the said Eleanor Leatt, the said premises, and also the said bond for 40*l.*

Mr. *Leach*, and Mr. *Spranger* argued for the plea.

Sir *Samuel Romilly*, and Mr. *Phillimore*, against it.

The *Lord Chancellor*.(a)

The idea I have of it is, that it is not a good plea. The equity of redemption is conveyed for the purpose of discharging certain demands made upon the mortgagor and certain individuals, that is, the individuals who

(a) The judgment *ex relatione*.

executed the bond. The trustees to convey could only convey so much interest as she had, namely, the estate in trust to sell.

Stabback
v.
Leatt.

The plea was ordered to stand for an answer with liberty to except.(b)



JONES and others *versus* GILHAM and others.

[49]
*Master of the
Rolls for
Lord
Chancellor.*

THIS was a bill of interpleader, filed by the plaintiffs as directors of the Hope Insurance Company, against the defendant Gilham, as landlord of a house burnt down, and who had brought this action for the amount of the insurance, and against the defendant Jones, as tenant under an agreement for a lease, who had filed a bill for specific performance against plaintiffs and the other defendant, praying against plaintiffs that they might lay out the money in rebuilding the premises pursuant to the statute.

The plaintiff in a bill of interpleader is not entitled after replying to the answers, to move for his costs, but must set down the cause for hearing.

The plaintiffs obtained an order enjoining both parties from proceeding in the said suits, upon the plaintiffs paying into court the amount of the insurance.

The defendants answered separately, admitting the above facts; but defendant Gilham, by his answer, insisted that this was not a case for interpleading, the defendant Jones having no right to the money.

(a) See *Brooks v. Middleton*, *post*.

Jones
and others.
v.
Gilham
and others.

The plaintiffs having replied to the answers, and served subpoenas to rejoin, now moved to have their costs paid out of the fund in court.

Mr. *Hart* and Mr. *Cooper* for the motion.

Sir *Samuel Romilly*, *contra*.

[50] His Honour took time till the next day to consider, and then at the rolls delivered his opinion, that the defendants were at liberty, upon motion, to take advantage of the ground of demurrer stated in the answer; and that the plaintiffs must set down the cause for hearing; and refused to give the costs of the cause to them in the present stage of the suit. See *post*, S. C.

HEADLEY *versus* READHEAD, and others.

Rolls.
Ma.25, 1813.

Where the vendor of an estate would have absorbed the personal assets in payment of his purchase money, a rateable contribution was decreed as between the devisee of the estate and the legatees and annuitants under the purchaser's will.

WILLIAM READHEAD, the testator in this cause, by his will, reciting that he had contracted for the purchase of an estate, directed his executors to pay the purchase money for the same, and he devised the said estate to his natural son, the defendant, William Readhead, and he also gave several legacies and annuities to the other defendants.

The bill was filed by the executors, to take the directions of the court, there being a deficiency of personal estate to pay both the purchase money and the legacies and annuities; occasioned by some Scotch leaseholds not having passed by the will, which was not

made according to the forms of the Scotch law, but the same descended like real estate to the heir at law.

Headley
v.
Readhead
and others.

Upon the hearing of the cause, the usual accounts were directed, and inquiries as to the purchase.

The Master, by his report, stated the accounts, and the contract for purchase of the estate, by the result of which it appeared that the personal estate was about sufficient to pay either the purchase money due, or the legacies and annuities, but not both.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Cooper*, for [51] the legatees and annuitants.

This is a case in which the vendor, as a creditor for his purchase money, absorbing the personalty, and thereby by defeating the legatees and annuitants, the assets must be marshalled in their favour. That the benefit of a vendor's lien for his purchase money shall be extended to third persons, see *Trimmer v. Bayne*, 9 Ves. 209. The direction in the will makes no difference, the testator equally intended the legatees and annuitants to be paid as the vendor.

Mr. *Leach* and Mr. *Trower* for the devisee.

The general principle of marshalling is admitted; *Trimmer v. Bayne* decides no more; but this is a case of special provision by the will. Besides, the report has not been excepted to by the legatees and annuitants, and therefore the Master's finding of the personal estate liable to pay debts cannot be impeached. Neither can assets be marshalled as between specific and pecuniary

Headley legatees, in which case the devisee and the other de-
 v. feudants stand.
 Readhead.
 and others.

Sir *Samuel Romilly*, in reply.

The Master can never find a conclusion of law; he can never marshal assets; he can only find the facts. If the defendants are in the situation of legatees, then the devisee, in respect to the sum to be paid for the residue of the estate, is in the same situation as the other defendants, and there must be a rateable contribution.

His Honour took time to consider, and afterwards decided that this was a case for rateable contribution.

[52]

Rolls.

June 1, 1813.

JERVOISE versus SILK.

Maintenance under the circumstances given to a father who had £6000 a year of his own, and although no report of debts had been made.

In this case, which was a petition, to confirm a report of maintenance, it appeared that the father who sought for maintenance had 6000*l.* a year; that the six infants, his children, were entitled to an estate of 8600*l.* a year, according to the present rental; but which of course would increase.

No report had been made as to debts.

The petitioner, however, stated by affidavit, that the expenses of his establishment, consisting of a house in Hanover Square, a house in Essex, and another in Hampshire, which latter, however, he was proceeding to dispose of, were fully equal to his income. The Master had found that 1400*l.* a year for the six children, the

eldest being thirteen, including a governess for the girls, would, in his opinion, be a proper allowance. By affidavit it was stated, that the funds were sufficient for debts, &c.

Jervoise
v.
Silk.

Mr. *Hart* opposed the confirming the petition upon two grounds: 1st. of the father being competent, having 6000*l.* a year; 2d. that the application was premature, the debts not being paid.

Sir *Samuel Romilly*, Mr. *Richards*, and Mr. *Cooper*, for the petitioners.

The preliminary objection has been got over by Lord *Eldon*, in *Warter v. ———*, 13 Ves. 92. upon the authority of a case cited of *Wear v. Wilkinson*, before Lord *Roslyn*, and upon the principle of the length of time the taking the accounts might consume. It is enough if the court is satisfied *aliunde* that the property is sufficient; 2d. though *prima facie* 6000*l.* a year seems to give a father competency to maintain his children, yet his establishment must be looked to, and the expectations of the children taken into consideration.

[53]

Sir *William Grant*.

It is very loose to consider any particular income as enabling a father to maintain his children. To a nobleman 6000*l.* a year certainly would not be thought enough to exclude him from requiring some maintenance out of his children's fortunes. To a private gentleman it may be otherwise. On the outside, it here would seem enough; at the same time the expenses of his establishment, and his children's expectations, are circum-

Jervoise
v.
Silk.

stances to be looked to. It would be a harsh thing for the court to oblige the petitioner to put down his establishment in any part to educate his children, when they have large incomes of their own. In the present case, therefore, I shall confirm the report upon this ground, that I do not see enough to make me dissent from the conclusion the Master has drawn, who, of course, had his attention directed to all the facts and particulars, more than the court can possibly have.(1)

[54]

In *Lincoln's*
Inn Hall.
Lord Eldon.
August 11,
1813.

Ex parte HILL.—In the matter of BROOKE, a Lunatic.

Where a lunatic had been tried for murder, and acquitted on account of his lunacy, but ordered by the judge to be detained, the Lord Chancellor declined ordering him to be removed out of gaol to a proper receptacle for lunatics, the proper application being to the king in council.

BROOKE having been found a lunatic under a commission was afterwards committed for murder to Warwick gaol, and tried and acquitted on the ground of his lunacy ; but the judge ordered him to be detained in that gaol as a dangerous lunatic under the late act.

This petition was presented by his committee to have certain sums allowed out of his estate for his support, and the expense of his defence on the trial, and also that he might be removed out of gaol to a proper receptacle for lunatics.

The Lord Chancellor said there was a difficulty in the way ; and after consideration ordered the sums to be paid, with liberty for the committee to make any application they thought proper respecting his custody to the king in council.

(1) See *Buckworth v. Buckworth*, 1 Cox's Ca. 80.

SKINNER *versus* SWEET and w i

August 14,
1813.

I MOVED before the Vice Chancellor, that the defendant, the widow and executrix, and who was an annuitant of 250*l* per annum, charged on leasehold estates by the will of the testator, might be paid the arrears due and to grow due by the receiver, which had been appointed. No report of debts had been made; but the defendant, by her answer stated, that all debts which had come to her knowledge had been satisfied.

Arrears of annuity ordered to be paid to widow and executrix, al-
[55]
though no report of debts had been made, it being stated, by her answer, that there was no deficiency of assets.

The Vice Chancellor refused the motion for want of the report as to the debts, stating, that any legatee might as well apply on the ground of distress; and that if the plaintiff could distrain, that was another reason against coming to the court.

The same day I moved it as an appealed motion before the Lord Chancellor, arguing, that though the court would not order any principal sum to be paid, yet that it would direct interest on incumbrances, and arrears of annuities to be paid by receivers: and that the defendant could not hear the cause or get a report, and might therefore be kept for many years out of all means of subsistence.

Lord Chancellor.

I think such motions have been granted here; but not to the extent of directing future arrears to be paid.

And after consulting with Mr. Croft, the register, he made the order as to the arrears due, the defendant un-

Skinner v. Sweet and wife. dertaking to refund, if necessary, and referred it to the master to make a separate report of debts.

N. B. The order was afterwards stopped by the Chancellor, and I had to speak to it again : but it was finally made.

PARIS *versus* GILHAM and others.

JONES *versus* PARIS.

[56]
Rolls.

Nbs. 8, 1813.

Interpleader may be in favour of an insurance company against the landlord of premises which have been burnt down, but insured by him, and the tenant of the premises, under an agreement for a lease, and claiming therefore a right to have the money laid out in rebuilding the premises.
Ante, p. 49.

THE first cause prayed the specific performance of an agreement for a lease against the defendant Gilham, and as against the other defendants, who were the directors of the Hope Insurance Company, that 700*l.* the amount of a policy entered into by the defendant Gilham, might be laid out in rebuilding the premises which had been consumed by fire, pursuant to the 14 *Geo. 3.* c. 78. s. 83.

The second case was a bill of interpleader by the insurance office against the landlord who had brought an action on the policy, and against the tenant who had filed the above bill. By an order in this cause the money had been paid into court, and the injunction granted.

Sir Samuel Romilly, and Mr. Wilson, for the defendants in the first cause, argued, 1st. That the tenant of premises burnt down had no equity against the landlord. *Brown v. Quiller*, (a) the only case in favour of such

equity, had been overruled by *Hare v. Grove* (a) and *Holtzapffel v. Baker* (b)(1) 2d. The clause in the act 14 Geo. 3. is where the tenant insures, not the reversioner. If the tenant may file such bill, where the landlord has insured, any owner of a rent charge may do so though issuing out of a hundred houses.

Paris
v.
Gilham
and others.
Jones
v.
Paris.

Mr. *Leach* and Mr. *Shutter*, relied on the words of the act.

[57]

Mr. *Hart* and Mr. *Cooper*, for the company.

N. B. The counsel for both Paris and Gilham contended that this was no case for interpleader. The insurance office might have moved by affidavit, or tried the point at law. The first bill had prayed an injunction against Gilham, the second did no more.

The causes stood for judgment this evening, when Mr. Wilson informed the court that the parties in the first cause had come to a compromise.

His Honour then said, that from the best opinion he could form, this was a proper interpleading bill. The landlord brings his action for the money, the tenant files a bill to have it laid out in re-building the premises. Though the mode of relief is different, the subject is the same, viz. getting at the money.

(a) *Anstr.* 687.

(b) 18 *Ves.* 115.

(1) The Supreme Court of New-York determined in *Hallett v. Wylic*, 3 *Johns. Rep.* 44. that destruction of the premises by fire could not exempt the tenant from paying rent.

The plaintiffs in the interpleading bill were ordered to be paid their costs of both suits, and of the action at law, out of the fund in court.

WHITE *versus* WILLIAMS and Wife, FAINT, and
HORSFALL.

[58]

Rolls.

June 21, 1814.

Surviving executor held entitled to the whole residue where the executors had unequal legacies, and though the testator had left his will unfinished, a blank being in the ordinary place for the residuary clause.

THE question in this case was, whether the executors or next of kin were entitled to a residue, and if the executors, whether the defendant Faint was by survivorship entitled to the whole.

The testator, Francis Moxon, by his will gave unequal legacies to his executors, and also gave legacies to his next of kin, and ended his will with these words, "all rents and profits arising from my houses in Westmoreland Buildings I give unto my wife, until the second quarter-day after my decease, then the writings to be given to my nephew James William Wild." Then followed a chasm of about five or six inches before the testator's signature.

The widow first proved and died; then Wild, and then the defendant Faint.

Evidence was gone into of the testator's intention to make some additions to the provision for his wife. This was entered into by the plaintiff who was the personal representative of the widow, who was an executrix as aforesaid. She claimed half as next of kin, or one third as executrix.

The defendants Williams and wife claimed as representatives of Wild, one-fourth as next of kin, or one-third as executor. Faint claimed the whole as surviving executor. Horsfall one-fourth as next of kin.

White
v.
Williams and
wife, Faint
and Horsfall.

Sir *Samuel Romilly*, and Mr. *Collinson*, for the plaintiff.

Mr. *Hart*, and Mr *Cooper*, for Williams and wife.

[59]

Mr. *Dowdeswell*, for Horsfall.

Mr. *Hart*, and Mr. *Hall*, for Faint.

The evidence of the plaintiff was rejected, because, though parol evidence may be given to rebut an equity, it cannot raise one.

It was argued, 1st. That though unequal legacies to executors would not exclude them, yet the will being imperfect, and they having legacies, the court would presume the testator intended to give the residue from the executors. *Kenewell v. Gardiner*,^(a) and *Bishop of Cloyne v. Young* :^(b) though in the last case, the residuary clause was begun, but not finished ; that the will was imperfect in this case, the bequest of the leaseholds not being finished, inasmuch as it did not direct the leaseholds and the possession of them to be given to the nephew. 2d. The executor Faint not proving till all the others had died, who had sustained the burthen of administering, ought not to have the whole.

The master of the rolls, however, thought the executors were entitled, because the will in *Knewell v. Gar-*

(a) *Gilb. Eq. Rep.* 184.

(b) 2 *Ves.* 91.

White. *diner* had begun a sentence, but here not, but only left
 v. a space, after finishing a bequest.
 Williams and wife, Faint,
 and Horsfall.

[60]

His Honour took time to consider the point of survivorship till this day, when he said, the fund in question was unadministered assets, and he thought it must belong to the surviving executor. No costs out of it.

UTTERSON *versus* UTTERSON and others.

August 15,
 1814.

Where a testator interlined his will to except the plaintiff who was named a legatee under it with others, and also made a codicil expressly excluding him, but afterwards obliterated the codicil without doing the same with the interlineation of the will, the court admitted the plaintiff to an equal interest with the other parties taken under the will, considering the inference as certain that the testator so intended.

THE testator by his will devised and bequeathed freehold, leasehold, and copyhold premises, and all his personal estate equally amongst his children.

By codicil he declared that his son, the plaintiff, should have only 1s. He interlined also his will, by adding, after naming his children, the words, "except my "son John James," the plaintiff. The testator afterwards revoked the codicil by obliterating it, but did not do any thing with the interlineation of the will.

The codicil was not executed according to the statute, nor was the will republished.

On a suit in the ecclesiastical court the judge, Sir *William Wynne*, rejected the interlineation in the will, and gave probate without it.

The freehold and copyhold estates being sold, the plaintiff filed his bill for a share of the purchase money

equally with his brothers and sisters, the latter being *femes covert* whose interests had been put in settlement before their marriages; and one of them having issue, rendered this suit necessary to take the decision of the court upon the case, which all the parties who were *sui juris*, would otherwise have arranged out of court.

Utterson
v.
Utterson and
others.

[61]

It was admitted on the hearing that the sentence of the ecclesiastical court only affected the personal estate; and that the codicil and interlineation did not revoke the will, as to the freeholds, from the want of republication.

His Honour decreed for the plaintiff, considering that the conclusion was a necessary one, that the interlineations were made at the time of the codicil being made.

Sir *Samuel Romilly*, and Mr. *Heald*, for the plaintiff.

Mr. *Hart*, Mr. *Bell*, and Mr. *Cooper*, for the defendants.

GLOSSOP *versus* HARRISON and HAWKES.

Jy 21, 1814.
August, 20.

THE original bill in this case was filed on the 29th June, 1814, against the defendant Harrison alone, stating, that he was appointed under an order of this court receiver or treasurer of the opera house, and that thereupon the plaintiff became his surety in a bond for 3000*l.* conditioned for his duly accounting to the trustees of the said theatre for the moneys that should come to his hands as such receiver, and paying the same into their

A surety for a receiver is entitled to stand in the place of the receiver, to be paid sums ordered to the receiver out of funds in court, in respect of disbursements made by him,

Glossop
v.
Harrison and
Hawkes.

the money for
making such
disbursements
having been
advanced by
the surety,
and the same
giving him
therefore a
lien on the
money order-
ed to be paid
to the receiv-
er.

banker's hands. Shortly afterwards Harrison was in advance for the opera house, in consequence of payments made by him to the tradesmen and others belonging to that theatre. Harrison also had been in some degree compelled by the threats and clamours of the above creditors, and also to enable the theatre to go on, to apply part of the moneys received by him as such treasurer in discharge of their demands, instead of paying over the same into the banker's hands. Upon that occasion he applied to the plaintiff, and borrowed of him the sum of 143*l.* 16*s.* for which he gave him the following promissory note:— "143*l.* 16*s.* London, Feb. 20, "1813, one month after date, I promise to pay to F. Glossop, Esq. the sum of one hundred and forty-three pounds sixteen shillings, for value received, to enable me to pay into the banker's the nightly receipt of Saturday, the 15th February instant, which I made use of in paying the weekly bills of that night at the King's theatre, by order of Mr. Taylor, and to complete which Mr. Taylor sent me 12*l.* 8*s.* and should Mr. Taylor, or the trustees, reinstate me with the above sum of 143*l.* 16*s.* before this bill is due, I hereby promise to discharge the said bill. H. Harrison." By an order, dated the 29th June, 1813, Harrison, on his own application, was discharged from his office of treasurer, and it was thereby referred to the Master to take an account of the moneys paid by him on account of the theatre. The Master by his report, dated the 18th March, 1814, allowed him the sum of 451*l.* 6*s.* 1*d.* and reported the same to be due to him in respect of his advances. On the 26th April, 1814, the court ordered the said sum of 451*l.* 6*s.* 1*d.* so certified to be due to Harrison, to be paid to him.

The bill farther stated, that the said sum of 451*l.* 6*s.* 1*d.* included the said sum lent by the plaintiff to Harrison, and for which he had given the above note, but which had never been paid, and it prayed that the plaintiff might be paid the said note out of the 451*l.* 6*s.* 1*d.* reported due to Harrison, and that the latter might be restrained from receiving the same.

Glossop
v.
Harrison and
Hawkes.

Harrison, by his answer and disclaimer, admitted the above facts; but stated, that by indenture of assignment dated the said 29th June, 1814, he had conveyed all his estate and effects, including the above sum reported due to him, to Thomas Hawkes, in trust for Hawkes and the other creditors of Harrison; and he disclaimed for himself all interest in the said sum.

Hawkes, as such trustee, proceeding to get the money which had been ordered to be paid to Harrison, the plaintiff moved that the accountant general might be directed not to pay to Harrison the sum of 451*l.* 16*s.* 1*d.* ordered to be paid to him.

July 21.

Mr. *Leach* and Mr. *Trollope*, for the plaintiff.

Mr. *Bell* and Mr. *Cooper*, for the defendant.

It was argued by the plaintiff's counsel, that the alleged execution of the deed of assignment being upon the same day as the bill was filed, was probably after, and that the court would not let the fund go out of court till they saw more of the case.

It was insisted by the defendants, that it was contra-

Glossop
v.
Harrison and
Hawkes.

[64]

ry to the practice of the court to grant this order, especially as the defendant had disclaimed ; and that though the bill was filed, and deed bore date both on the same day, there was no evidence of the bill being filed before the deed was executed, or ground for inferring it.

The *Vice Chancellor*, however, was of opinion, that justice required that the order should be made, putting the plaintiff upon the terms of amending his bill immediately, by making Hawkes a party.

The bill being amended by adding Hawkes as a defendant, he put in his answer, and thereby stated, that he was a stranger to all the circumstances of the case, except the order for the payment of the 461*l.* 6*s.* 1*d.* to Harrison ; and he relied upon the assignment to him of the 29th June, 1814, as executed in the forenoon of that day, and that although the plaintiff's bill was filed on the same day, yet he had no notice of the same until after the execution of the said indenture of assignment ; and he submitted that the plaintiff had no lien upon the said sum of 461*l.* 6*s.* 1*d.* for the said debt of 143*l.* 16*s.*

August 20.

The plaintiff moved before the *Lord Chancellor*, on this day, for an injunction to restrain the defendants from receiving the 461*l.* 6*s.* 1*d.* insisting upon the plaintiff's lien for the amount of the note ; and that the terms of the above note gave him such lien.

The *Lord Chancellor* thought there was some case which had determined that the surety for a receiver was entitled to stand in the place of the receiver to the extent of his demand, in a case of this sort, and ordered

the motion to stand over for the purpose of looking into the books for such a case.

Glossop
v.
Harrison and
Hawkes.

[65]

On the following day the counsel for the plaintiff informed the court that they had not been able to find such a case, but they cited *Wright v. Morley(a)* as an authority for the principle that a surety was entitled to the same right as the creditor.

Sir *Samuel Romilly*, for the defendant *Hawkes*, argued, that *Wright v. Morley* did not apply to the present case, that being merely the common case of the right of the surety being made available against the separate property of the wife of the principal, which had been conveyed with her privity to secure an annuity granted by the husband. Here the assignment was to the defendant *Hawkes*. In this case the note was only an engagement to pay out of moneys received by *Harrison* from the trustees, whereas he had received none from them, but had got an order upon a fund in court.

The *Lord Chancellor* said, he thought that he had a note of a case himself, as between the surety of a receiver and such receiver, deciding the equity which he had before mentioned, and he would look for it.

Some time afterwards, and just before the long vacation, his Lordship said(b) he had not been able to find the note of the case which he had before mentioned; but said, that if there was no such case, that there ought to be such a decision now made, and he granted an injunction according to the prayer of the motion.

The parties afterwards came to a compromise.

(a) 11 *Ves.* 12. 22.

(b) *Ex relatione.*

Rolls.

Jy 29, 1814.

HOWGRAVE *versus* CARTIER.

Power of appointment in a marriage settlement held to comprehend, as its objects, all the children of the marriage, and not to be confined to such of the children only as should be living at the death of the survivor of the parents.

THE question in the cause was, whether a power of appointment contained in the marriage settlement after stated, comprehended as its objects all the children of the marriage; or whether it was confined to such children only as should be living at the death of the survivor of the parents.

The settlement was dated the 20th April, 1743, and was made between Peter Wyche, and Elizabeth his wife, of the one part, and Lord Tyrconnel and William Mildmay, trustees, of the other part, and after reciting, in substance, that the said Peter Wyche, in consideration of his marriage with the said Elizabeth his wife, and of considerable property which he became entitled to in right of his said wife, had agreed to invest on or before the 24th day of June, 1740, the sum of 20,000*l.* South Sea annuities, in the names of trustees, for the uses, and upon the trusts, after declared; and that he had transferred to Lord Tyrconnel and William Mildmay, 10,000*l.* South Sea annuities, in part of the 20,000*l.* South Sea annuities; and had agreed to secure a transfer of the remaining 10,000*l.* by a charge upon lands belonging to him, sufficient for that purpose: the settlement contained a demise, by the said Peter Wyche to the trustees of certain lands therein described, for a term of one thousand years, for securing the transfer of such remaining 10,000*l.* South Sea annuities.

The deed, then, after containing some ordinary and common covenants and clauses for the better and more effectually securing the transfer of the remaining 10,000*l.*

South Sea annuities, and declaring that the trusts of the whole 20,000*l.* were in the first place, out of the dividends or interests, to pay to Elizabeth Wyche an annuity of 200*l.* for her separate use, and after payment of that annuity to pay the residue of the dividends or interest to the said Peter Wyche for life, proceeded as follows :

Howgrave
v.
Cartier.

[67]

“ Provided nevertheless, that if the said Elizabeth, the
“ wife of the said Peter Wyche, shall die before him
“ the said Peter without leaving any child or children
“ of her body, begotten by the said Peter Wyche, or if
“ leaving any such child or children they shall all die
“ before any of them shall attain the age of twenty-one
“ years, then upon trust to pay, or cause to be paid,
“ such sum or sums of money, not exceeding together
“ in the whole 3000*l.*, to such person or persons, or to
“ and for such uses, intents, and purposes, and at such
“ time or times as the said Elizabeth, the wife of the
“ said Peter Wyche, shall, notwithstanding her cover-
“ ture, by any writing or writings by her signed and
“ sealed, in the presence of two or more credible wit-
“ nesses, direct or appoint. And in case of such direction
“ or appointment, that they the said John Lord Viscount
“ Tyreconnel, and William Mildmay, or the survivor of
“ them, or the executors, administrators, or assigns of
“ such survivor, do and shall, with all convenient speed,
“ and notwithstanding the said Peter Wyche being then
“ alive, sell so much of the said capital stock or fund of
“ South Sea annuities as will be sufficient to answer
“ and make good such direction and appointment of the
“ said Elizabeth Wyche, the wife of the said Peter
“ Wyche, and in case the said Elizabeth shall survive
“ the said Peter Wyche, then upon trust to pay the

Howgrave
v.
Cartier.

[68]

“ whole of the dividends or interest arising from the said
 “ South Sea annuities, unto the said Elizabeth, or her
 “ assigns, during the term of her natural life, to be in
 “ full bar and recompense of her dower and thirds at the
 “ common law, that she might or could claim out of any
 “ manor, messuages, land, or hereditaments whatsoever,
 “ that the said Peter Wyche should happen to be seized
 “ of, interested in, or entitled unto, at any time during
 “ the coverture between them. And from and after the
 “ decease of the survivor of them the said Peter Wyche
 “ and Elizabeth his wife, in case there shall happen to
 “ be any child or children of their two bodies living who
 “ shall be of the age of twenty-one years, or who shall
 “ after arrive to such age, born in the lifetime of the
 “ said Peter Wyche, or after his decease, then upon
 “ trust that they the said John Lord Viscount Tyrcon-
 “ nel and William Mildmay, and the survivor of them,
 “ and the executors, administrators, and assigns of such
 “ survivor, do and shall transfer the whole of the said
 “ sum of 20,000*L*, South Sea annuities so transferred,
 “ and secured to be transferred to them as aforesaid,
 “ unto or amongst such child or children of the said
 “ Peter Wyche and Elizabeth his wife, at their respect-
 “ ive ages of twenty-one years, in such proportions and
 “ manner as the said Elizabeth Wyche, sole or married,
 “ shall, by any deed or writing, under her hand and seal,
 “ either executed by her alone, or in conjunction with
 “ the said Peter Wyche, in the presence of two or more
 “ witnesses, direct or appoint ; and for want of such di-
 “ rection or appointment, then upon trust, to transfer
 “ the same unto such of the said child or children, at
 “ their age or ages of twenty-one years, and in such pro-
 “ portions and manner as the said Peter Wyche shall, by
 “ any deed or writing, under his hand and seal, executed

“ by him in the presence of two or more witnesses, or
 “ by his last will and testament in writing, executed and
 “ attested as aforesaid, direct and appoint ; and for want
 “ of such direction or appointment, both of the said
 “ Elizabeth Wyche, and the said Peter Wyche, then
 “ upon trust to transfer the whole of the said sum of
 “ 20,000*l.*, South Sea annuities, unto such child or chil-
 “ dren of the said Peter Wyche and Elizabeth his wife,
 “ at their respective age or ages of twenty-one years ; if
 “ more than one, share and share alike ; and if there
 “ should be but one such child, then to such one child
 “ only ; and in case there shall be no such child or chil-
 “ dren, or they shall die before any of them shall attain
 “ the age of twenty-one years, then upon trust to trans-
 “ fer the said sum of 20,000*l.* South Sea annuities, unto
 “ the survivor of them, the said Peter Wyche and Eli-
 “ zabeth his wife, for his or her own use, or as such
 “ survivor shall direct or appoint ; saving, nevertheless,
 “ in case the said Peter Wyche should be such survivor,
 “ the power aforesaid given to the said Elizabeth
 “ Wyche, to charge the said sum of 20,000*l.* South Sea
 “ annuities, with the payment of any sum or sums of
 “ money not exceeding the sum of 3000*l.* as aforesaid.”

Howgrave
 v.
 Cartier.

[69]

After this clause followed a proviso, empowering the trustees, at the request of the said Peter and Elizabeth Wyche, or the survivor of them, to sell the South Sea annuities, and to invest the money to arise from such sale in government security, or stock in any of the public funds, and from time to time to change such securities, or to sell the same, and invest the money thereby arising in the purchase of lands, which lands, when purchased, the settlement expressed should be settled as near as might be to such uses as were therein before

Howgrave mentioned concerning the South Sea annuities, with the
v.
Cartier. following exception :

[70] " Except that in case there shall be no appointment
 " made by the said Elizabeth Wyche, or the said Peter
 " Wyche, of the said lands, to the children they may
 " happen to have, that the said lands so to be purchased
 " shall not be equally divided amongst such children ;
 " but shall be limited to the use and behoof of the first,
 " and all and every other son and sons of the said Peter
 " Wyche, begotten or to be begotten on the body of the
 " said Elizabeth his wife-successively, and in remain-
 " der, one after another as they shall be in seniority of
 " age and priority of birth, and to the use and behoof
 " of the heirs of the respective body and bodies of every
 " such son and sons, and for want of such issue, then
 " to the use and behoof of all and every the daughter
 " and daughters of the said Peter Wyche, on the body of
 " the said Elizabeth begotten or to be begotten, if more
 " than one, to take as tenants in common, and not as
 " joint tenants, and to the heirs of the body of every such
 " daughter or daughters, and for want of such issue,
 " then to the right heirs of the survivor of them, the said
 " Peter Wyche and Elizabeth his wife, for ever."

The settlement then, after containing some farther common covenants and clauses, which it is unnecessary to state, concluded with a covenant on the part of Peter Wyche, that his heirs, executors, and administrators should and would within six months after his death pay to the said Elizabeth Wyche, in case she should survive him, 5000*l.*, for her own use, over and above the several matters aforesaid.

There were issue of the marriage two children, John and Mary.

Howgate
v.
Cartier.

Peter Wyche died in the year 1763. After Peter's death, Elizabeth Wyche, on the 28th April, 1769, appointed 5000*l.*, part of the 20,000*l.* South Sea annuities, to the son John absolutely, for his immediate use; and such 5000*l.* was transferred to him accordingly. On the 9th June, 1769, she made a farther appointment of 11,650*l.* other part of the 20,000*l.* South Sea annuities, to be transferred to John absolutely, after her death. John afterwards died in the lifetime of his mother, having by his will, dated the 8th June, 1769, (the day before the last appointment,) left all his property to his mother and appointed her sole executrix: and she as executrix procured from the trustees a transfer to her of the 11,650*l.* The mother then died in March, 1784, without having made any valid appointment of the remaining 3350*l.*, leaving Mary Wyche, the daughter, surviving her. Mary died in March, 1810, without ever having had any part of the 3350*l.* transferred to her. At the time of her mother's death she was in a weak state of mind, and she continued so down to the period of her own death.

[71]

The bill was filed in 1812, by the administrators of Mary Wyche, against the executors of the mother Elizabeth Wyche, who, as above stated, was the sole executrix of the son John Wyche, and against some persons in whose names the unappointed 3350*l.* was standing, insisting that the power of appointment in the settlement was confined in its objects to such children of the marriage as should actually be living at the death of the survivor of Peter and Elizabeth Wyche, and that a child dying before that period could neither take under an ap-

Howgrave.
v.
Cartier.

[72]

pointment, or for want of appointment, and consequently that the appointments of the 5000*l.*, and 11,650*l.* in favour of John Wyche, were void, and that those two sums, as well as the remaining 3850*l.* being unappointed, all vested in Mary Wyche, as the only child who was living at the death of the survivor of Peter and Elizabeth; and praying a declaration accordingly, and that the 8350*l.* might be transferred to the plaintiff, as the administrator of Mary Wyche, and that the executors of the mother, who were also the representatives of John the son, might, out of the estates of the mother and son, re-invest the 11,650*l.* and 5000*l.*, and that the same, when re-invested, might be transferred to the plaintiff, as the administrator of Mary.

The cause was argued by Mr. *Hart*, Mr. *Lovat*, and Mr. *Preston*, for the plaintiff; and by Sir *Samuel Romilly*, Mr. *Leach*, Mr. *Bell*, and Mr. *Newland*, for the defendants.

In the course of the argument the following cases were cited: *Wingrave v. Palgrave*, 1 P. W. 401. *Woodcock v. The Duke of Dorset*, 3 Bro. 569. *Hope v. Lord Clifden*, 6 Ves. 499. *Wilmot v. Wilmot*, 8 Ves. 10. *Schenck v. Leigh*, 9 Ves. 300. *Powis v. Burdett*, 9 Ves. 428. *King v. Hake*, 9 Ves. 438. *Randall v. Metcalf*, 3 Bro. Parl. Cas. 8vo. 318. *Jeffreys v. Reynous*, 6 Bro. Parl. Cas. 398. *Doe v. Wainwright*, 5 T. R. 427.

Nothing turned upon the circumstance of John Wyche's will being made the very day before the appointment of the 11,650*l.*

The Master of the *Rolls*.

Many late decisions have established the principle upon which cases of this nature are to be decided. If a settlement clearly expresses that the right of a child to a provision shall depend upon its surviving its parents, the court cannot alter or controul such a disposition. But if the language of a settlement be contradictory or ambiguous, the court exercises its own principle, and will lean in favour of such a construction as shall give the children vested interests; a son at twenty-one, a daughter at twenty-one, or marriage. *Wingrave v. Palgrave*,^(a) is a case of the first description. Other cases, which have been cited in argument, are of the last description.

*Howgrave
v.
Cartier.*

[73]

As to *Wingrave v. Palgrave*, it is impossible that a doubt could exist. For there was no daughter living at Augusten Palgrave's death; and consequently the trust of the term never rose.

As to the other cases: In *Woodcock v. The Duke of Dorset*,^(b) the settlement, according to the report of that case, contained very strong expressions, and Lord *Thurlow* had great difficulty to get the better of them. But collecting from the whole of the settlement taken together, an intention inconsistent with those expressions, if taken by themselves and construed according to their strict and literal sense, he broke through them, and gave effect to what he conceived to be the true spirit and meaning of the deed. It has been stated from the bar that the printed report of that case is inaccurate, and that the expressions in the settlement, as it is set forth in the Register's book, are by no means so strong as the report represents, and might without difficulty be construed so as to let in all the children, instead

(a) 1 P. Wms. 401.

(b) 3 Bro. 569.

Howgrave.
v.
Cartier.

of confining the word "such" to such children only as should survive both parents. But I think there was great difficulty in the case, even taking the expressions of the settlement according to the Register's book. (a)

(a) The witnessing part of the settlement extracted from the Reg. Lib. B. 1789, fol. "It was witnessed that for the considerations aforesaid, and of 500*l.*, part of the 5500*l.*, being the portion of the said Lady Frances Sackville, which it was thereby agreed that the said John Lord Gower should retain to his own use, and also of 10*s.* paid, &c. the said John Lord Gower did bargain, sell, and demise unto John Duke of Bedford and Greenville Levison Gower, the manor of Greendon, in the county of Stafford, with the several messuages, farms, and appurtenances thereto belonging, of the yearly value of 700*l.*, to hold to the said John Duke of Bedford and Granville Levison Gower, their executors, administrators, and assigns, for five thousand years, at the rent of a pepper corn, upon trust that the said Duke and Granville Levison Gower should, out of the rents and profits of the said premises, or by sale or mortgage thereof, or of a competent part thereof, for all or any part of the said term, raise and pay the yearly sum of 200*l.* to the said John Lord Sackville and Lady Frances his wife, during their natural lives, and the life of the longest liver of them, by two equal half yearly payments; and upon farther trust, that if the said John Lord Sackville and Lady Frances his wife should leave at the decease of the survivor of them any child or children of their two bodies lawfully begotten, "or to be begotten, then to raise and levy the yearly sum of 200*l.*, by two equal half yearly payments as aforesaid, and apply the same for the maintenance of such child or children, in such manner as the said trustees should think fit, until such child or children should attain the age of twenty-one years, then by ways and means aforesaid, to levy and raise the sum of 5000*l.* and pay the same unto the children, if more than one, of the bodies of the said John Lord Sackville and Lady Frances his wife, lawfully begotten, or to be begotten, in equal shares and proportions, upon their attaining their respective ages of twenty-one years; and if there should be but one such child, then upon trust to pay the whole sum of 5000*l.* to such only child at his or her age of twenty-one years."

In the case of *Hope v. Clifden*(a) also, there was a good deal of difficulty : but notwithstanding, the court construed the settlement so as to vest the portion. In *Powis v. Burdett*,(b) Lord *Eldon* by management and struggle changed the word "leave," into "have." In *Schenck v. Leigh*,(c) I took advantage of the slip, wanting the word "such."

Howgrave
v.
Cartier.

[75]

Now in the present case, if the construction the plaintiffs contend for were to be adopted, the parents never could make any provision for, or any appointment in favour of, any child excepting such as should survive them both: and yet how could such a child be ascertained in their life time? how could they know the child would survive them? Though a child might attain twenty one, and be married, yet, according to the plaintiff's construction, if such child happen to die in the lifetime of either of the parents, any provision or appointment in favour of it would fail. Surely this could not have been the intention of the parents. They never could have meant to put it out of their power to make any appointment.

The effect of the clause which gives the power of appointment, and limits the fund in default of appointment, depends upon the correct use of the word "such." Throughout the settlement, that word is repeatedly used inaccurately and absurdly, and without any meaning. And I cannot collect a clear and unambiguous intention that the parties, by the use of the word "such" in this passage, meant to exclude all children excepting such as should survive both parents.

[76]

(a) 6 Ves. 499.

(b) 9 Ves. 428.

(c) 9 Ves. 300.

Howgrave
v.
Cartier.

I am therefore, of opinion that the appointments to the son of the 5000*l.* and 11,560*l.*, were good. And as the persons to take in default of appointment are the same description of persons in favour of whom an appointment might be made, I am also of opinion that one half of so much of the 20,000*l.* as is unappointed, vested in the son, and the other half vested in Mary Wyche, his sister.

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY,

IN
HILARY TERM, 1815,

IN THE FIFTY-FIFTH YEAR OF THE REIGN OF GEORGE III.

AGAR *versus* THE REGENT'S CANAL COMPANY.

*Lincoln's Inn
Hall.
First Seal be-
fore Hilary
Term.
Jan. 14, 1815.*

THE bill in this case was filed by the plaintiff, as the owner of an estate, through which the defendants proposed to make the canal, which they were empowered to cut by a private act of parliament obtained by them for the purpose. The prayer of the bill sought an injunction to restrain the defendants from carrying the proposed canal through the plaintiff's garden and rick-yard.

An application was made upon filing of the bill, supported by an affidavit of the facts stated in the bill, for an injunction according to the prayer above mentioned, and which the *Lord Chancellor* granted.

Upon the coming in of the answer, the defendants moved to dissolve the above injunction, and the court, upon hearing counsel on both sides, varied the injunction so far as to restrain the defendants only from deviating in cutting their canal from the line prescribed by the eleventh section of the act of parliament(a), and the

Though the court will not restrain an action of trespass by a party, through whose estate a canal is cutting, for deviating from the line, because he has laid by and rested upon his legal rights; yet if he files a bill to restrain their deviating, and then moves to commit them, the court will not do so, without a trial by a jury in a disputed case, and directing an issue at law.

[78]

(a) Passed 13th July, 1812.

Agar. plan left in pursuance thereof in the office of the clerk
 v. of the peace for the county of Middlesex.
 The Regent's
 Canal Com-
 pany.

The parties not coming to any understanding between themselves, as to what was the line prescribed by the act of parliament, and contained in the plan, the defendants, agents and workmen were proceeding in making the cut according to the judgment which they had formed as to such line. The plaintiff thereupon moved the court to commit them to the Fleet prison for a breach of the injunction which he had obtained. Various affidavits by engineers, surveyors, and others, were filed on both sides, by which it appeared that the deviation made by the defendants from the line, if any thing, was not very considerable ; and those made on the part of the defendants imputed to the plaintiff an endeavour to throw every obstacle in their way in making the canal, and a refusal on his part to point out any line whatsoever passing through his estate, as the one prescribed by an act of parliament.

The application was argued at considerable length during the preceding term, by Sir *Samuel Romilly* and Mr. *Bell*, in support of the motion for a committal ; and by Mr. *Hart*, Mr. *Leach*, and Mr. *Wetherell*, against it. Pending the application some proposition for an accommodation was made by the plaintiff to the defendants ; but which appeared not to have been agreed to. The motion stood for judgment till the above day.

[79] The Lord *Chancellor*, after stating the circumstances of the case, and the proceedings which had taken place in the cause, said, that it was quite clear that the defendants had a right to carry their canal through some

part of the plaintiff's estate; but must adhere to the line prescribed by the act of parliament, and the plan deposited in the office of the clerk of the peace. That if companies of this sort receive the encouragement of the legislature, as they do, they must not be stopped altogether by any individual; on the other hand they are bound to see that the execution of the act of parliament is, in the first place, according to their powers under it; and in the next place, that it is in a practicable manner. If in the present case the plaintiff, instead of filing his bill in equity, had lain by, and rested upon his legal rights, and then brought an action of trespass against the defendants for a supposed deviation from the line pointed out by the act of parliament, this court would not, on a bill filed by the defendants, have restrained the plaintiff from proceeding in such his action of trespass. But if the plaintiff, instead of bringing his action of trespass because the other side, as he supposes, has gone wrong, chooses himself to come into equity, and affidavits are made by engineers and surveyors on their behalf, that the line pursued by them is the correct line; though this evidence is met by affidavits on the other side, this court will not, without farther examination, take so strong a step as to commit the defendants; but will first direct an issue at law to try the fact, and endeavour to find out thereby the true line which the canal ought to take. His Lordship also stated, that any proposal of accommodation he considered merely as *ad referendum*, and which in no case could influence his judicial opinion.

Agar
v.
The Regent's
Canal Com-
pany.

The motion was refused.

*Lincoln's Inn
Hall.*

1815.

Jan. 16, 17,

EARL CHOLMONDELEY, and ANN SEYMOUR DAMER
versus LORD CLINTON and others.

A solicitor for one of the parties in a suit cannot become the solicitor for the opposite party, though he is separated from the partnership which jointly were so employed on the other side, and the remaining partner still continues so employed and the deed of dissolution stipulated that he should not act as solicitor for that party. On motion for an injunction to restrain such solicitor who had gone over, from so acting

SIR *Samuel Romilly*, supported by Mr. *Bell*, Mr. *Heald*, and Mr. *Preston*, moved in this cause, on the behalf of the defendant Lord Clinton, for an injunction “to restrain Lord Cholmondeley from employing William Montriou, a solicitor of this Honourable Court, and also one of the attorneys of his majesty’s court of King’s Bench, as his solicitor in this suit, or as his attorney or solicitor in any other suit, in equity or action at law, commenced or to be commenced by the said Earl Cholmondeley against the said Lord Clinton, in respect to any estates or property, the title whereof came to the knowledge of the said William Montriou, as the clerk to William Seymour, one of the above-named defendants, a solicitor of this Honourable Court, while the said William Seymour was the attorney and solicitor of the defendant Lord Clinton, or which came to the knowledge of the said William Montriou, as solicitor for the said Lord Clinton, in partnership with the said William Seymour and one William Squibb, and also to restrain the said William Montriou from acting as solicitor or attorney for the said Earl Cholmondeley in any such suits or actions, and from communicating to the plaintiff Earl Cholmondeley, his counsel, solicitors, attorneys, or agents, any information relating to the matters in dispute in such suits or actions which have come to the knowledge of the said William Montriou as clerk to the said William Seymour, or as solicitor to the said Lord Clinton.

It appeared by the affidavit of Lord Clinton that he had been informed by Lord Cholmondeley himself that he had received information from an anonymous person relative to Lord Clinton's estates, in consequence of which Lord Cholmondeley had commenced the suit against him in question. That the said William Montriau had been formerly a clerk to William Seymore, who was his Lordship's solicitor, and afterwards becoming his partner, they were both employed by his Lordship as solicitors to conduct his defence in this suit; and that he believed that the said William Montriau, first as clerk to, and afterwards as partner with, the said William Seymour, acquired such information relative to the title of the defendant to the estates in question in this suit, and matters connected therewith, as would render his being concerned in the management of this suit as solicitor for the plaintiff Earl Cholmondeley highly prejudicial and injurious to the deponent.

Earl Cholmondeley,
and Ann Seymour Damer
v.
Ld. Clinton
and others.

The affidavit of William Seymour then stated, that in 1805 he was first employed by Lord Clinton as his attorney and solicitor; that about the same time the said William Montriau became his clerk at a salary; that he continued such clerk till Christmas, 1808; that in 1809 articles of partnership were entered into between them; that as such partners they were the solicitors of Lord Clinton, which partnership was dissolved at Michaelmas, 1813; and that a little before such dissolution Squibb became a partner. The said William Montriau, whilst he was such clerk and partner with Seymour, became intimately acquainted with the title to Lord Clinton's estates. by preparing or correcting abstracts of such title, his peculiar employment being the conveyancing department; that in 1812 the claim was

Earl Chol-
mondeley,
and Ann Sey-
mour Damer
v.
Ld. Clinton,
and others.

made by the plaintiff to the estates in question, which are of the estimated value of several hundred thousand pounds, and a bill was accordingly filed in June, 1812. The affidavit then stated, that shortly after the separation, William Montriou, on the 19th December, 1814, wrote a letter to inform Seymore of his appointment to be solicitor for the plaintiff Lord Cholmondeley, in the conducting of his suit against Lord Clinton; and that Seymore immediately wrote the following note to him: "Mr. Seymore has read Mr. Montriou's note with the greatest astonishment, and should he persevere in conducting to conduct for Lord Cholmondeley the suits originally confided to him and Mr. S. by Lord Clinton, S. must consider Mr. M. as acting unjustly to Lord Clinton, and dishonourably to Mr. S. It is impossible but that Lord Clinton would impute to Mr. Montriou the having betrayed his confidence by communicating to Lord Cholmondeley the doubt upon which he had founded his claim."

Against the motion the affidavit of William Montriou stated, that Seymore alone communicated and corresponded with Lord Clinton, and advised with his counsel, and that the result was kept a secret from the deponent and all other persons in the office; but he admitted that he was well acquainted with the abstract of the title of Lord Clinton to the estates in question in the cause, but that all the deeds contained in it were stated in the pleadings; that by a stipulation in the deed of dissolution of partnership, Montriou could not be employed as solicitor for Lord Clinton; that after the dissolution of partnership he wholly lost sight of the suit, and on the 13th of December last he received a note from Timothy Brent, Esq. the secretary and con-

fidential agent of the plaintiff Earl Cholmondeley, intimating his the said Timothy Brent's intention to call upon the deponent on the following day between three and four o'clock ; that the said Timothy Brent did in consequence call upon deponent, and then communicated Earl Cholmondeley's wish for the deponent to take the future conduct and management of this cause, for and on behalf of him the said Earl, and Ann Seymour Damer, the other plaintiff in this cause ; that the said Timothy Brent having explained to the deponent the cause and particular motives which had induced the said Earl to apply to the deponent, he, deponent, begged permission to defer giving any answer until the following day ; that deponent on the following day, namely, on the 15th December last, wrote and sent to the said Timothy Brent, a letter, in the words following : " Sir, since I had the honour of " receiving Lord Cholmondeley's message relative to the " Clinton suits, I have availed myself of the counsel of " a gentleman eminent in the profession. The hesitation " which I previously felt to oppose the interest of Mr. " Seymour, my late partner's client, in a matter of such " extreme importance, has been removed, and I now beg " to express my readiness to obey his Lordship's com- " mands. I am, sir, your's obediently, Will. Montriau." That the deponent afterwards, by the desire, and at the request of the said Earl Cholmondeley, waited upon and saw the said Earl, and agreed to accept his appointment ; that the deponent neither directly nor indirectly solicited or sought for such appointment ; on the contrary, the same was most unlooked for and unexpected on the part of deponent. The deponent then denied that he was in possession of any information acquired by him as clerk, or as partner to Seymour, re-

Earl Cholmondeley,
and Ann Seymour Damer
v.
Ld. Clinton
and others.

[83]

Earl Chol-
mondeley,
and Ann Sey-
mour Damer
v.
Ld. Clinton
and others.

lative to the estates in question, which rendered his being employed for the plaintiffs highly prejudicial and injurious to the defendant. He also offered to make an affidavit, denying that he was the person who had made the communication to Lord Cholmondeley.

[84]

The affidavit of Brent stated, that having heard William Montriou, of Basinghall-street, in the city of London, gentleman, spoken of in a very flattering manner, and as a solicitor well qualified to manage and conduct causes in Chancery, deponent recommended and advised the said Earl to appoint the said William Montriou to be the solicitor for the plaintiffs in this cause ; and upon and in consequence of such recommendation, the said Earl directed deponent to apply to the said William Montriou, and deponent did accordingly apply and request the said William Montriou to accept such appointment ; and deponent says, he does not believe that the said William Montriou either directly or indirectly solicited or sought for such appointment ; on the contrary, deponent believes that the application made by deponent to the said William Montriou, as aforesaid, was quite, on the part of the said William Montriou, unexpected and unlooked for.

The counsel, in support of the motion, admitted, that this application was novel, or at least that no precedent for it could be found ; but they argued, that it was right upon the general principle that an attorney or solicitor was bound not to disclose facts coming to his knowledge in such character, and which was the privilege of the client or party, and not of the solicitor himself ; and they cited for this the cases of *Wilson v. Rustell* (a) and a

(a) 4 Term Rep. 753.

case there cited by Mr. Justice *Buller*, in which the doctrine of privilege was fully discussed before Lord *Hardwicke*, also *Buller's Nisi Prius*, 284. and *Sandford v. Rennington (a.)* This privilege of the client never ceases. Lord *Clinton*, in the present case, had not turned off *Montriau*; if he had, the case might perhaps be different. But one partner leaving another does not amount to that. As there has been a joint undertaking by them, it constitutes a joint obligation of secrecy. It would even be easy for a solicitor by his conduct to compel his client to discharge him, if the being discharged could enable him to go to the other side. But *Montriau's* dissolving partnership with *Seymour*, though it was discharging Lord *Clinton*, could not discharge himself from the duties and privileges which had resulted to the client from the confidence that had been reposed in him. It is also contrary to the oath of solicitors, by which they swear faithfully to serve their clients.

Earl Cholmondeley,
and Ann Seymour Damer
v.
Ld. Clinton
and others.

[85]

Sir *Arthur Pigott*, Mr. *Hart*, Mr. *Leach*, Mr. *Roupell*, and Mr. *Shadwell* opposed the motion, as not only unprecedented, but as attended with most extensive consequences. If a solicitor can be so restrained, every clerk may be so also, and the principle would even extend to counsel, conveyancers, &c. There is no decision or even *dictum*; to show any such general rule. In this case there was a stipulation in the deed of dissolution of partnership, that *Montriau* should never be employed by Lord *Clinton*, and to which Lord *Clinton* assented by continuing to employ *Seymour*, and not *Montriau*. As to the sacred obligation of secrecy supposed to exist, it cannot be after the employment ceases,

(a) 2 Ves. jun. 189.

Earl Chol-
mondeley,
and Ann Sey-
mour Damer
v.
Ld. Clinton
and others.

a person exercising a profession being a sort of public servant : so a counsel advises on pleadings, not being retained, and is the next day retained on the opposite side, and may then advise for such opposite party. If an attorney violates his oath, he may be proceeded against criminally, but this court has no preventive power against his so doing.

[86] Sir *Samuel Romilly*, in reply.

Of the two questions in this case, first as to the legality of the conduct in question, and secondly as to the delicacy of it ; not one of the counsel have said a word in support of the latter. That a solicitor can never discharge a client, which is the principle of the remaining question, the cases of counsel do not show the contrary. It is not pretended that a retained counsel can give his services to the opposite party ; now a solicitor is a retained adviser, and the analogy therefore is against *Montrieu*, if it has any thing to do with the case. This is not a case merely of criminal conduct cognizable elsewhere, which it is sought as such to prevent, but also to stop irreparable injury which may otherwise be done to the defendant. Burning a house is a crime ; but it is also waste which may nevertheless be restrained in equity. I consider this application, even as something more than a motion made in this cause only, for it is also an appeal to the general jurisdiction of the court over solicitors. As to the denial of possessing information which may prove highly prejudicial and injurious to Lord Clinton, it is a denial in the words of Lord Clinton's affidavit, but an answer in the terms is not an answer to all the alternatives of the paragraph.

The *Lord Chancellor*, in the course of the argument, observed more than once, that this application must be determined upon a general principle and ground, and not upon the particular circumstances of the case, because, otherwise, that breach of confidence must take place, and that discovery be given, which the application in its nature protests against.

Earl Cholmondeley,
and Ann Seymour Damer
v.
Ld. Clinton
and others.

His Lordship, after the argument, expressed his opinion to be, that the case lay within a very narrow compass, though it had led to a great length of discussion. In the present case, the plaintiff had been informed by somebody of a supposed flaw in the defendant's title; Montriou had been a clerk to, and afterwards partner with the defendant's solicitor in the cause, and now was appointed the plaintiff's solicitor in this very cause. If, said his Lordship, I were sitting on the trial of a cause at *Nisi Prius*, I should have great difficulty in deciding that a clerk becoming afterwards a partner could give evidence against a client, of matters which had come to his knowledge whilst such clerk.(1) The dissolution of partnership which took place in this case between Seymour and Montriou was a contract entirely between themselves, with a clause also that Montriou should not act as Lord Clinton's solicitor. As to the argument that Lord Clinton by assenting to that, must be taken to discharge Montriou, I cannot agree to it. The client must employ one or the other, or neither; it is impossible he can employ both; if Montriou was discharged, Seymour might also have been discharged; if one is employed, as he alone can be, is the other then

[87]

(1) Upon the exemption of an attorney, &c. from divulging the secret of a client, see *Parkhurst v. Lowten*, 2 Swanst. Rep. 194. and 3 Mad. Rep. 121.

Earl Cholmondeley,
and Ann Seymour Damer
v.

Ld. Clinton,
and others.

let loose, as it is termed? If neither is employed, are both let loose? there being in this case a covenant between these solicitors themselves, that one of them shall not accept such employment from the defendant. It cannot be. I am therefore clearly of opinion that there is no ground in this case for saying that Montriou was a discharged solicitor. I also lay out of my view of this case, the facts relative to the application to Montriou, to become the plaintiff's solicitor. I consider the question to be, nakedly, whether a person having been long officiating in a cause as the solicitor, and afterwards discharging himself, as I must take it that Montriou did in this case, by the dissolution of partnership, can afterwards become the attorney on the other side in that cause. Now, I may have overlooked circumstances in my life, but I certainly do not recollect an instance of it to have ever before happened. In the absence of precedent or law appearing upon the subject, the reasonableness of the thing must be looked to. But even if an attorney is discharged, can it be, that his having been so discharged by one party, shall be the very reason why the other party shall employ him? In this case I repeat, that I form my judgment upon the dry ground of right, not upon the circumstances or delicacy of the case. If Lord Cholmondeley asks my judgment upon the delicacy of the case, as he seems to do from a letter in one of the affidavits, I must act as Lord Thurlow once did in my hearing to a noble Lord now dead, who sat on the bench whilst his cause was hearing, in which cause that noble Lord had admitted interest upon a debt claimed, and the case being argued first upon the legal right or interest, and next as to the delicacy in withdrawing any admitted right; Lord *Thurlow* desired the arguments as to the delicacy to be,

[88]

addressed to the noble Lord, and those only as to the law to be addressed to himself. So, in the present case, I must also take leave to act in the same manner. I leave the delicacy of Lord Cholmondeley's conduct to his own decision. But this being a general point, applicable as much to all the courts of justice, as to this, I will myself speak to the common law judges upon the subject, and then communicate their opinion.

Earl Cholmondeley,
and Ann Seymour Damer
v.
Lord Clinton
and others.

His Lordship this day stated, that he had requested the chief justices of the courts of king's bench and common pleas, and the chief baron of the exchequer, to inform him of the opinions of their respective courts upon the above point; that he had been informed by Lord Ellenborough, and Lord Chief Justice Gibbs, that the opinions of their two courts were, that an attorney could not be allowed so to act; that he had also spoken to the Master of the Rolls, and the Vice-Chancellor, and that they concurred in the opinion; but he had not yet been able to learn the opinion of the Court of Exchequer, which, however, he would communicate as soon as he received it.

Jan. 25.

[89]

This morning the *Lord Chancellor* informed the counsel in this cause, that since the subject was last mentioned, he had received from the Lord Chief Baron of the Court of Exchequer the opinion of that court, which was that no solicitor, who had been employed as such on one side, could afterwards be employed on the other. His Lordship stated that the opinion of all the courts and judges he had communicated with also was, that Montrieu did not stand in the situation of a dischar-

Earl Cholmondeley,
and Ann Seymour Damer
v.
Ld. Clinton
and others.

ged solicitor. He added, that he should say no more in judgment upon the motion, as Montriou had been advised by counsel that he might become the solicitor of the plaintiffs in the cause, and had acted upon that advice, believing it to be right.

*Lincoln's Inn
Hall.
Jan. 19, 1815.*

WHITFIELD versus RALFE.

Injunction in this court, though the court of law in which the action has been brought, [90] have, upon an application made to it to stay proceedings, on a release of one of the plaintiffs, and affidavits of the circumstances of the cases, refused to stay proceedings.

MR. HART showed cause upon the merits against dissolving the injunction which had been obtained in this case. The circumstances of it were, that the plaintiff applied to the co-executor of Ralfe for a loan of 700*l.*, and which he agreed to lend the plaintiff out of their testator's assets, upon the plaintiff executing two separate bonds of 400*l.* and 300*l.* to Ralfe, and his co-executor jointly. The 400*l.* was paid to the plaintiff, but the 300*l.* was not, though the defendant's co-executor had a promissory note for 300*l.* due to the testator in his hands. Payment of the 300*l.*, notwithstanding the bond had been given for it, was delayed for four years, at the end of about which time the defendant's co-executor becoming insolvent, Ralfe was for the first time apprized of the non payment of the 300*l.*, and requested to give up the bond. This was not complied with, and an action commenced against him upon it. Whitfield having got a release of the action from the co-executor of Ralfe, applied to the court in which the action was brought to stay the proceedings, which the court, upon hearing the circumstances, refused to do.

Mr. *Leach*, on the other side, contended that courts of common law exercised an equitable jurisdiction in deciding upon applications such as had been made in this case; and that the plaintiff having once failed in

such appeal to equity, was not entitled to an injunction in this court. Besides, from the circumstance of the plaintiff suffering so long a time as four years to elapse, after giving the bond, before he informed Ralfe of his having never received the 300*l.* from his co-executor showed that they had agreed to pocket so much of the testator's property between them, and that the bond was merely to indemnify the defendant's co-executor in so doing.

Whitfield
v.
Ralfe.

The Lord Chancellor.

I confess I have some difficulty in admitting the exercise of the equitable jurisdiction of courts of law as here stated. I take the question in this cause to be whether the plaintiff by his conduct has not led the defendant into a state of liability to make good this 300*l.* His co-executor having alone possessed the note for 300*l.* Ralfe would not have been answerable for it in account, but may become so by taking the plaintiff's bond to himself, and his co-executor jointly for that sum.

[91]

His Lordship continued the injunction; but ordered the 300*l.*, with the interest and costs at law, to be brought into court, or, in default thereof, that the injunction should stand dissolved.

FREEBODY *versus* PERRY.

Jan. 21, 1815.

THIS was an appealed motion from the decision of the *Vice Chancellor*, who had refused the application.

Motion by one
tenant in com-
mon who had

Freebody
v.
Perry.

agreed to sell to the other, that the latter should pay his purchase money into court, refused; where such purchaser had been before and at the time of the purchase in possession of the whole, [92] with the approbation of the other tenant in common.

Mr. *Wakefield*, on the part of the plaintiff, moved for an order that the defendant might pay his purchase money into court. The plaintiff and defendant being tenants in common of the lands and premises in question, an agreement was entered into between them, for the sale of the plaintiff's moiety to the defendant for 2050*l*. An abstract had been delivered of the title, and no objections taken. The defendant had ever since the date and signing of the agreement, as he had for a considerable time previous thereto, been in the possession of the said moiety, and received the rents and profits thereof; but by his answer he stated that he had all along kept an account as between himself and the plaintiff of the rents and profits so received, and had at all times been, and then was, ready and willing to account with the plaintiff for such rents and profits.

Sir *Samuel Romilly*, and Mr. *Huddleston*, opposed the motion, because it was only where a purchaser took possession without consent, that it constituted a sufficient ground to call upon him to pay his purchase money into court. That was not the case here, the defendant having long before the agreement been in the receipt of the whole of the rents, with the approbation of the plaintiff, as it was necessary that one party should be where there were tenants in common, and he had always been ready to account with the plaintiff for his share. *Walters v. Upton*, (a) was a case where a tenant purchased of his

(a) The Reporter has been favoured with the brief in *Walters v. Upton*. By it, that case appears to have been as follows: In March, 1812, Sir *Samuel Romilly* moved in the above cause for the plaintiff, that the defendant might pay his purchase money into court. The defendant being tenant, had contracted with his land-

landlord, and when he was called upon for his purchase money claimed to be only tenant, and when called upon for his rent then claimed to be purchaser; the court, under those circumstances, ordered him to pay his purchase money into court.

Freebody
v.
Perry.

Mr. *Wakefield*, in reply, insisted that *Walters v. Upton* was an authority for the present application, which case had turned upon objections to the title; the defendant by his answer in that case had, stating that by the agreement he was not to pay his purchase money till a title was made, and conveyance executed to him. He was, notwithstanding his possession, commenced as tenant, ordered to pay his purchase money into court.

The Lord CHANCELLOR thought there was no foundation for the application, and refused the motion.

CORSON *versus* STIRLING.

Jan. 19, 21,
1815.

THE bill in this case was filed by the plaintiff as acceptor of a bill of exchange, against the defendant as

lord to purchase the premises for 500*l*. The defendant had approved of the title, and had caused a conveyance to be prepared. He afterwards, however, refused to complete his contract, and by his answer made objections to the title.

Exceptions
to the Master's
report, as to
impertinence,
is not cause
against dis-
solving an in-
junction.(1)

Mr. *Wakefield*, for the defendant, insisted, that by the agreement, as stated in the answer, the purchase money was not to be paid till a good title could be made, and relied upon the objections stated in the answer.

The court ordered him to pay his purchase money into court in six weeks.

(1) See *Neale v. Waddeson*, 1 Cox's Ca. 104. and *Rennet v. Barnewall*, 2 *Ibid*. 26.

Corson.
v.
Stirling.

holder, alleging that the acceptance was given for accommodation, that the holder was aware of that circumstance, and that he, the holder, never gave any consideration for the bill ; and prayed an injunction.

[94] The plaintiff obtained an injunction for want of an answer ; the defendant then put in his answer ; and the plaintiff referred the answer for impertinence. The Master reported, that the answer was not impertinent. The defendant then moved to dissolve the injunction nisi. The plaintiff then excepted to the Master's report ; and it now came on upon the day for showing cause against the injunction being dissolved absolutely.

Mr. *Shadwell*, for the plaintiff, insisted, that by the practice of the court the taking exceptions to the Master's report was good cause against dissolving the injunction, until the exceptions were disallowed by the court.

Mr. *Leach* and Mr. *Lovat*, on the part of the defendant, submitted to the court that though exceptions to an answer be good cause against an injunction being dissolved, yet, when the Master has reported against the exceptions, the plaintiff cannot by excepting to the report, show the exceptions to the report as cause against the injunction being dissolved ; for though the original exceptions still continue in court, and the court is to decide upon them, yet *qua* the injunction the Master's report is decisive : and that the impertinence stood upon the same footing.

The *Lord Chancellor* expressed his opinion to be, that the practice was as stated by the defendant, and put

it upon the plaintiff's counsel to produce an authority to the contrary ; if he did not, the injunction was to stand dissolved.

Corson
v.
Stirling.

The next day but one after, Mr. *Leach* informed the court that Mr. *Shadwell* had communicated to him that he was unable to find such an authority.

Injunction dissolved.

[95]

HOOPER *versus* GOODWIN.

Jan. 21.

MR. TRESLOVE moved to discharge an order allowing Thomas Kington to open the biddings, as to a lot sold under a decree in this cause, upon the ground that he had an interest in the said premises. Kington, it appeared, was entitled under the will of the testator in this cause as residuary legatee of one-eighth.

A residuary legatee has not such an interest as to prevent his becoming himself a purchaser of premises sold under a decree in the cause.

It was argued, that if a party interested could open biddings, he had only, if the biddings as to the sale were brisk, to be silent ; but apply afterwards to the court, which was contrary to the principle of the case of *Sumner v. Charlton*(a) and which case was not clearly and unequivocally impeached in *Rigby v. M^rNamara*.

Sir *Samuel Romilly* opposed the motion, because if a residuary legatee could not open biddings, it followed that no legatee or creditor could do so. This was not like the case cited, which was that of a party being present at the sale, and afterwards coming to open the biddings.

(a) Cited in *Rigby v. M^rNamara*, 6 *Ves.* 117.

Hooper
v.
Goodwin.

The Lord Chancellor.

[96]

I am quite sure that there have been cases, in which tenants for life and remainder-men of estates, charged with payment of debts, have, over and over again, been permitted by the court to purchase such estates. But I have often expressed my regret, that notwithstanding it is against the rule of the court that the solicitor in the cause should become the purchaser, yet, in fact, he often contrives to do so.

Motion refused with costs.

Exparte KENSINGTON.

Jan. 23.

When the Court of Chancery directs an action to be tried at law, though it is with special directions, as that the bankruptcy of the defendant shall not be pleaded in bar, and that the parties shall be examined on oath, the application for a new trial must be to the court of law; but it is otherwise with an issue.

AN action at law having been directed in the bankruptcy of Stein, Smith, and Co. for the purpose of trying a question of usury, charged against the petitioners who were bankers, and as such had had the transaction in question with the bankrupts; that action was accordingly tried, when the jury found a verdict in favour of the petitioners.

The *Attorney General*(a) this day, being the first day of term, came into court, for the purpose of moving for a new trial in the said action, suggesting that the court of King's Bench, in which the action had been tried, upon his having opened the application for the new trial to that court, had intimated a doubt whether the motion should not be made before the *Lord Chancellor*, he having directed the action, and made it part of the order that the bankruptcy of Stein, Smith,

(a) Sir William Garrow.

and Co. should not be set up in bar of the action, and that the parties should be examined upon the trial.

Ex parte
Kensington.

The Lord Chancellor.

The constant and uniform practice of this court has been, whenever an action has been directed by it, even with all the benefit of such discovery, by the oath of the party, as this court can obtain, I mean by directing the parties themselves to be examined on such trial, that the application for a new trial should be made to the court of law which has tried the action, till that court is satisfied with the verdict; though it is otherwise with an issue, in which case the motion for a new trial is to be made in the court of Chancery.

[97]

The *Attorney General* having thereupon retired, made his motion for the new trial on the same day to the Court of King's Bench, which, upon its being stated to them what had passed in this court, entertained the application.

Ex parte BRECHLEY.

Jan. 25.

ON the 24th day of September, 1814, a commission of bankrupt was issued against the petitioner, under which he was declared a bankrupt. The petitioner had passed his examination and obtained his certificate. The certificate was, on the 29th November, left by the petitioner at the office of the Lord *Chancellor*, and the advertisement thereof was inserted in the gazette of the said 29th November. No petition to stay the certificate

Petition to stay certificate not being served till the day of petitions, though not answered till the day before, the bankrupt declared entitled to his certificate.

'Ex parte
Branchley.

was served on the petitioner before the next day of petitions, which was on the 21st December.

Mr. *Montague*, in support of the petition, cited *Ex parte Kendall*.(a)

- [98] Mr. *Cullen*, on the other hand contended, that the petition had been served in due time; the same not having been answered till the 20th, and served the day after. The bankrupt had also received it without making any objection. He was also sufficiently apprised of its contents in time to oppose it. But if the bankrupt had not been served in due time, his conduct amounted to a waiver of the objection.

The Lord Chancellor.

Petitions to stay certificates are often presented on private or on interested grounds, as to shut out evidence. I therefore thought it proper to lay down a rule upon the subject, that if the bankrupt was not served in time to hear the petition, on the next day of petitions he should be entitled to his certificate. The certificate in this case was brought into the office, and advertised so long ago as the 29th November. The creditors ought therefore to have been sooner prepared with their petition to stay the certificate. I think this case falls within the rule. Let the petition to stay the certificate be therefore dismissed, and the certificate be granted.

THE KING *versus* KNOX.

Order to set
down demur-
rer in the pet-
ty bag for ar-

Mr. *Abbott* moved in this case, being a proceeding in the petty bag, to set down a demurrer for argument. It

(a) 1 *Ves. & Beames*, 543.

was the case of an escheat upon an attainder for felony ; and the defendant having pleaded an outstanding term of years in bar of the right of the crown, the crown had demurred to that plea. The court was also requested to appoint a day for the argument.

The King
v.
Knox.

argument made
upon motion
in court.

[99]

The Lord Chancellor.

Let the demurrer be put in the paper, and I will communicate hereafter what day I will have it argued.

Exparte HODGKINSON.

THIS was a petition to supersede a joint commission of bankrupt, taken out against the petitioner and John Leigh. The petitioning creditors were three partners of the name of Crane, Platt, and Crump, and upon the taking out such commission, a bond for the usual purpose had been given, purporting to be their joint and several bond ; but the said bond had been executed by Crump only.

Where partners are the petitioning creditors, signature of the bond by one, is sufficient. A joint creditor taking a security from one partner on account, but which is not paid, does not render the debt a separate debt.

It farther appeared that the petitioner had drawn bills in his own name in the payment of the petitioning creditor's debt, before the commission was taken out ; but which bills were not paid by the acceptors when they became due. The petitioner had been twice before a bankrupt ; under the second of which commissions, though he had obtained his certificate, he had not paid 15s. in the pound. There were now also both a separate and a joint commission taken out.

Ex parte
Hodgkinson.

[100]

Sir *Samuel Romilly* and Mr. *Montague*, in support of the petition, relied, 1st, upon the words of the statute, (a) as requiring that all the petitioning creditors should join in the bond, which they argued extended to partners, and referred to *Buckland v. Newsame* : (b) 2dly, that the petitioning creditors, by taking the petitioner's separate bills, had elected to consider their debt as a separate, and not as a joint debt.

The present commission is also supersedable, because the bankrupt not having paid 15s. in the pound, under the second commission, his surplus property belongs to his assignees.

Mr. *Johnston*, for the petitioning creditors, relied upon the constant practice, where the petitioning creditors are partners, for one of them only to sign the bond, though it purports to be the joint and several bond of all the partners, and that it is so stated in Mr. *Cooke's* book on the bankrupt law : 2dly, that the bills in question were only taken upon account, and being afterwards dishonoured, did not discharge the other partner.

The Lord Chancellor.

Where there is a joint debt it has been the constant practice, for above a century, that the bond should be signed by one of the partners only, and I cannot now say that it is bad. So as to other matters in bankruptcy, it is a settled practice for one partner alone to prove, one partner to vote in the choice of assignees, and one partner to sign the certificate. Under these

(a) 5 Geo. 2. c. 30.

(b) 1 Taunt. Rep. 477.

Ex parte
Hodgkinson.

circumstances I am bound to be governed by what my predecessors have done, to be of opinion now, that this signing is sufficient. If I made a different decision, it would cut down all the commissions taken out by partners. This point is, however, now before the Court of King's Bench for their decision; but I should hope that court would have somebody from this court to state to them the practice which has obtained in this respect here. With respect to dormant partners this court has constantly said, that if a man deals with A. B. knowing nothing of C. D. his partner, and having nothing to do with him, he may consider himself as the separate creditor of A. B.; it has, however, been lately decided at law, that if an action is brought in such a case he may plead the partnership in abatement. I never, however, will disturb the practice here. In the present case, however, the question is, whether there being an acknowledged joint debt at one time, it is gone by taking a separate security, but which has never been paid? I think, that in this case the bills were taken as a mode of satisfying the debt, and not in discharge of it, and they not having been paid when due, the so taking them goes for nothing. As to the fact of this petitioner being twice a bankrupt before, and not having paid 15s. in the pound under the second commission, I take the law upon that to be, that his future effects are certainly liable; but not to his assignees. It has been decided, that where a creditor brings an action, and the defendant pleads his bankruptcy in bar of the action, the plaintiff may show in reply the fact of 15s. in the pound not having been paid under such second commission, and thereupon future effects are liable in judgment at the suit of such creditor. A similar decision has also taken place in the case of the insolvent acts. But surplus

[101]

Exparte
Hodgkinson.

effects are not liable to be claimed by such bankrupt's assignees, and the present commission is therefore clearly not to be superseded upon that ground.

Feb. 7th.

[102]

Another petition having been presented in this bankruptcy to supersede the commission, and relying still upon the above defect in the bond, the Lord *Chancellor* this day decided the point upon which he had intimated the above opinion, and stated, that he thought the clause in the act did not apply to the case of one of several partners signing the bond. Indeed, he considered the point as having been judicially decided over and over again, and acted upon for a great many years, in which he must at this day acquiesce, whatever might have been the construction of the act if the point had been *res integra*.

In *Exparte Roberts*, which came on 14th March, the same point occurred upon the execution of the bond by only one of the parties who were petitioning creditors, the petition being to supersede the commission upon that ground, the bankrupt being about to be tried at York the following day for concealing his effects. But Lord *Eldon*, without hearing the other side, said, that in *Expart Hodgkinson* he had looked into all the statutes and authorities which bore upon the point, and had collected together all the acts which one partner could do to bind the firm, and the whole formed an irresistible mass compelling him to decide against the objection, and he accordingly dismissed the petition.

SPOTTISWOODE *versus* STOCKDALE.

Jan. 19, 31.
1815.

THE bill in this case was filed by some of the creditors of John Stockdale, deceased, who were trustees as hereinafter mentioned, against his widow, who was also his executrix, stating that Stockdale in his lifetime being indebted, called a meeting of his creditors, when it was agreed that he should assign to the plaintiffs all his estate and effects as trustees, for the benefit of themselves and his other creditors. By indenture, dated the 18th May, 1814, he accordingly conveyed a leasehold estate and other effects to the plaintiffs in the usual manner; but with a proviso, that in case all the creditors of Stockdale, whose debts respectively amounted to 50*l*. or upwards, except only such creditors who had charges upon the said leasehold estate of the said John Stockdale, for their debts, and who choose only to rely thereon, should not by themselves, or by their respective partner or partners, attorneys or agents, thereunto legally authorized, duly execute the said indenture, or a duplicate thereof, or otherwise accede or agree to the terms and conditions thereof, on or before the 18th April next ensuing, then and in such case the said assignment was to be null and void. The bill farther stated, that Stockdale, shortly after the execution of the said indenture, delivered to the plaintiffs a paper which he assured them contained an accurate list of the names of all the persons to whom he was indebted in the sum of 50*l*. or upwards; and that all the persons included in such list did, on or before the 18th April, 1814, agree to sign the said indenture of the 18th March, 1814, and have actually signed the same. Stockdale died the 21st June, 1814, having first duly made his will, and thereby

Deed of composition by creditors not signed within the time stated in it, though void at law, yet if the creditors act under it, who [103] have not signed it, it is good in equity. Plea of two creditors not having so signed it, therefore held bad.

Spottiswoode
v.
Stockdale.

appointed the defendant his sole executrix, who has since proved the will and possessed herself of his effects. After the death of Stockdale the plaintiffs discovered that he was indebted to other persons to a large amount, beside those included in the list ; but to which creditors the bill stated that the plaintiffs have since caused applications to be made requesting them to become parties to the said indenture, and in consequence of such applications they executed the same accordingly. [104] The plaintiffs charged, that although all the creditors of Stockdale did not execute the assignment by the time limited therein for that purpose, nevertheless, as all the creditors executed or otherwise assented thereto, whose names were included in the list delivered to the plaintiffs, they insisted that the indenture was good and valid.

The bill prayed an account against the widow and executrix of Stockdale, and that his estate and effects might be applied according to the provisions in the deed, and that a person might be appointed to conduct and manage the business, and a receiver appointed of the debts, and that the defendant might be restrained from interfering in the testator's affairs.

To this bill the defendant put in a plea, thereby stating, that two persons mentioned in the plea were creditors of Stockdale, and whose debts amounted respectively to 50*l.* or upwards ; that they respectively had not any charges on the leasehold estate of Stockdale for their debts ; and that they respectively did not by themselves, or by their respective partner or partners, attorneys or agents, thereunto lawfully authorized, duly execute the said indenture or duplicate thereof, or other-

wise accede or agree to the terms and conditions thereof, on or before the 17th day of April next ensuing the day of the date of the said indenture.

Spottiswoode
v.
Stockdale.

A motion being made at the last seal before the term, upon an affidavit of the facts of the bill, for an injunction to restrain the defendant from interfering in the affairs of her late husband, by receiving any debts, or in any other manner, and to appoint a proper person to manage the business, and also for a receiver ; it was objected to such application, that pending the plea which had been put in, such motion could not be made. And though it was argued in reply to the objection, that an *interim* order could be made notwithstanding a dilatory, yet the *Lord Chancellor* ordered the motion to stand over, and the plea and the motion to come on together in the term. The plea and motion afterwards came on together.

[105]

Mr. *Hart*, in support of the motion, and against the plea, argued, that the defendant should have put in a demurrer, and not a plea, the question being, whether under the circumstances stated in the bill, the deed of assignment was not good in equity, though some creditors had not executed it within the time specified in the deed. That this plea was put in as a receipt in full to the application made to the court by the motion.

Sir *Samuel Romilly*, and Mr. *Shadwell*, for the defendant, argued, that a demurrer could not have been put in, because the bill stated, that although all the creditors did not execute the deed of assignment within the time limited therein for that purpose, yet as all the credi-

Spottiswoode tors executed, or otherwise assented thereto within that
 v.
 Stockdale. time, whose names were included in the list, that the
 ————— deed was good and valid.

The Lord Chancellor.

[106] I take it to be quite clear, that if creditors are to execute a deed of assignment by a time stated therein, and it is provided by the deed, that in case they do not do so, that the deed shall be null and void ; in case they do not execute the deed within the time, the deed is void at law. This deed therefore was void at law for that reason. But it is the constant course in equity, that if creditors act under such a deed, and thereby treat it as valid, although they have not executed it, that a court of equity will also act under it, and treat it as valid, whether such creditors have signed it or not. The bill in this case stating expressly, that such creditors as were not included in the list, having been requested to become parties to the deed, they have in consequence of such applications executed the same accordingly ; the plea does not extend to that fact, and I think it therefore bad ; it relies on the non-execution merely, not at all touching the true question in the cause.

Feb. 9th.

His Lordship a few days afterwards said, he thought the plea must stand for an answer, with liberty to except.

In the Matter of LORD PORTSMOUTH.

THE *Lord Chancellor*, before going into his private room for the purpose of proceeding with the farther hearing of the petition and affidavits, according to appointment, privately, as he had done before in the same business, desired that it might be understood that it had been the uniform practice in Chancery, as long as the court had existed, that in the case of family disputes, on the application of the counsel on both sides, in such family disputes, to hear the same in the Chancellor's private room; and that what was so done was therefore not the act of the judge, but of the parties themselves in such family cases.

Private hearing always on the consent of both parties.

MILLS *versus* FRY.

[107]
Feb. 4, 1815.

MR. HASLEWOOD moved on the part of the receiver in this cause, that the said receiver might be at liberty to distrain upon the several tenants of the premises mentioned in the pleadings of this cause who refused to pay their rents to him, and that the above-named defendant might, within a fortnight, deliver to him, the said receiver, an account of all sums received by him for rent of the said premises, and up to what particular time such rents have been received. The application was made upon an affidavit that the tenants had refused to pay the rents, and that he had applied in vain to them and to the defendant for information as to what was due. The bill filed in this case had prayed an injunction to restrain the defendant from receiving the rents, the appointment of a receiver, and that the title deeds might be brought into court. The court had already granted the injunction, and appointed a receiver.

After order to elect to proceed at law or in equity, a receiver appointed by this court cannot distrain for rent, without undertaking to proceed in equity only.

Mills
v.
Fry.

Sir *Samuel Romilly*, for the defendant, stated, that an order had been obtained on the part of the defendant to put the plaintiff to his election, to proceed either at law or in equity, he having brought an action as well as having filed the present bill. On the other hand, the plaintiff had moved to have it referred to the Master whether the proceedings at law and equity were both for the same thing; this motion had been opposed, and the court having taken time to consider, had not yet disposed of the motion. But he submitted that the order to elect having been made, and the plaintiff not having yet elected whether he would proceed at law or in equity, the court could not now grant the motion made in the cause.

[108] *The Lord Chancellor.*

I doubt whether I ought to have granted the motion for the receiver in this case, or the application for the injunction; but I must have done so upon the principle that part of the relief, if not all the relief, which the plaintiff claimed to be entitled to, was in equity only, and could not be had at law, namely, the injunction, and the delivery of the deeds. The order for putting the plaintiff to his election having been obtained, and the plaintiff, notwithstanding it, proceeding in equity, I doubt now whether he ought to have the benefit of the order to elect. The receiver might have come as an indifferent person, and applied to the court for restraining the plaintiff from proceeding at law. I cannot help the receiver upon the present application, for if I make this order every tenant of the estate may to-morrow file a bill of interpleader, in consequence of the proceedings by the plaintiff, both at law and in equity.

The plaintiff, however, undertaking to proceed in equity only, the court made an order, reciting such undertaking, according to the terms of the motion.

Mills
v.
Fry.

SHERWOOD *versus* SANDERSON.

Feb. 4, 1815.

A COMMISSION in the nature of a writ *de Lunatico Inquirendo*, had issued to inquire of the lunacy of Kitty Sherwood, a plaintiff in this cause. The commission had been executed on the 12th of August, 1814, and by the inquisition thereupon taken, it was amongst other things found, that the said Kitty Sherwood was neither a lunatic or idiot, but of unsound mind, so that she was not sufficient for the government of herself, her manors, messuages, goods and chattels, and that the said Kitty Sherwood had been in the same state of mind since the 1st January, 1814.

No costs
upon liberty
given to tra-
verse an in-
quisition in
lunacy.
[109]

Some of the relations of the said plaintiff Kitty Sherwood having presented a petition for liberty to traverse the said inquisition, the same had been allowed.

The parties who had presented the first petition for the commission of lunacy now applied by petition to have their costs of suing out the commission taxed and paid to them.

Sir Samuel Romilly, Mr. Martin and Mr. Johnson, for the petition, argued, that although Lord Loughborough, in *Ex parte Ferne(a)*, had said that no costs could

(a) 5 Ves. 832.

Sherwood
v.
Sanderson.

be given upon a successful traverse, there being no property in such case in the hands of the crown, yet that in the present case the inquisition was still subsisting, nothing having been done beyond the permission given to traverse it.

Mr. *Leach*, Mr. *Wetherell* and Mr. *Wingfield*, relied upon *Ex parte Ferne*, arguing, that the rule of law laid down in that case would be evaded, if the party were to be permitted to come and obtain an order for their costs, after permission had been given to traverse, but before the successful termination of the traverse.

[110] The *Lord Chancellor*.

I am of opinion with Lord Loughborough, in the case mentioned, and farther think that the traverse having not yet succeeded makes no difference. The result of the traverse cannot vary the question of right. I lament, however, that I have not the power of giving costs, considerable expenses having been incurred with very proper motives.(1)

Feb. 7, 1816.

DYSON *versus* BENSON.

After order
for time to
answer, a de-
murrer may
be taken off
the file.

MR. HART moved to take a demurrer off the file, as having been put in by the defendant in this cause, after he had obtained an order for six weeks' time to answer.

(1) See Collinson on Lunatics, 1. 461.

Dyson
v.
Benson.

Mr. Tveshore opposed the motion, upon the grounds, that the order for time had been obtained by the Solicitor by petition at the *Rolls*, before he had received a copy of the bill, and merely to prevent an attachment, and that before the order was drawn up, which it had never been, the demurrer had been put in. He stated, that this was a proper case to take the opinion of the court upon a demurrer, it being a bill filed by one partner against the other, for an account without praying a dissolution of the partnership, and referred to *Forman v. Homfray*,^(a) to show that such a bill could not be sustained.

The Lord Chancellor.

[111]

If after one order for time to answer the defendant might demur, he might also demur even after a third order for time to answer. Perhaps it may be expedient to make some regulation allowing a defendant farther time to demur than he now has; but according to the subsisting practice, this demurrer has been irregularly put in, and therefore must be taken off the file with costs.⁽¹⁾

WRIGHT *versus* ATKYNS.

THIS was an appeal from the decree of the *Master of the Rolls*.

^(a) 2 *Ves. and Beames*, 329.

Feb. 7, 1815.

Devise and bequest of real and leasehold estate to the defendant "and her heirs forever, in the fullest confidence that after her decease she will devise the property to my "family"; is an estate in

⁽¹⁾ Defendant after obtaining an order to answer merely, cannot demur. *Penn v. Baltimore*, Dickens, 273. *Ibid.* 685.

Wright
v.
Atkyns.

fee at law
but only for
life in equity,
with a trust as
to the inheri-
tance. The
decree at the
Rolls affirmed,
with this qual-
ification as to
the declara-
tion of the
party's right.
[112]
S. C. 17 Ves.
256. 1 Ves.
and Beames,
812.

The testator Wright Edward Atkyns, by his will dated the 29th October, 1804, devised and bequeathed all his manors, messuages, farms, lands, tenements, advowsons, and hereditaments, as well leasehold as freehold and copyhold, in Norfolk and Norwich, or in any other town, parish, or place, next or near adjoining, with their appurtenances, and all other his real estates whatsoever and wheresoever, and of what tenure or tenures soever, unto his dear mother Charlotte Atkyns, and her heirs for ever, in the fullest confidence, that after her decease she will devise the property to his family; and he thereby subjected and charged the aforesaid hereditaments and premises with the payment of all his just debts that he should owe at the time of his decease. And he thereby gave and bequeathed to his aforesaid mother Charlotte Atkyns, all his goods, chattels, and personal estates for her own benefit; and appointed her his executrix. The testator departed this life without leaving any issue, and the plaintiff, who was his uncle, was the testator's heir at law; and he was also entitled to two sums, 2700*l.* and 1000*l.* as personal representative of a mortgagee; being also the trustee under a conveyance of the testator's father, subject to those mortgagees upon trust for payment of the same by sale of the estates.

The bill was filed against Charlotte Atkyns, as devisee and executrix, praying an account of what was due for principal and interest upon the mortgages, and that the defendant might be decreed to pay the same in case the court should be of opinion that she is entitled to the fee simple and inheritance of the estates devised; or in default of payment, or in case the court should be of opinion that the defendant is entitled to an estate for life only, and therefore not bound to pay the plaintiff, then that the same might be raised by sale of the estates.

By the decree at the *Rolls*, it was declared that the defendant Mrs. Atkyns must be considered as only tenant for life of the hereditaments and premises mentioned in the pleadings, and that the plaintiff was entitled to raise by sale of the estates, or a sufficient part thereof, what should be found to be due for principal and interest in respect of the charge, and for his costs, and that what should be found due for interest since the defendant took possession, should be answered by her personally, and that what should be found due for principal and interest accrued at the time the defendant took possession of the estates, and the plaintiff's costs, when taxed, should accordingly be raised by sale of the said estates, or a sufficient part thereof.

Wright
v.
Atkyns.

[113]

The case was argued by Sir Samuel Romilly, and Mr. Heys, for the plaintiff; and by Mr. Leach, Mr. Hall, and Mr. Bell, for the defendant. But the arguments and authorities made use of at the *Rolls* being already fully reported, and the same being also very much gone into and considered by the *Lord Chancellor*, in his judgment, they are not here repeated. The case had stood some time for judgment, and on the above mentioned day, the *Lord Chancellor* gave his decision as follows :

This was a case argued some time ago, to the consideration of which I have since addressed my mind, in the hope that I should have been able to form an opinion more satisfactory to myself than the one I have formed. It was a case that came before the *Master of the Rolls*, and in which he made a decree, in August, 1810, and by that decree declared, that under the circumstances of the case, the defendant was to be considered only as tenant for life of the hereditaments and premises men-

Wright
v.
Atkyns

[114]

tioned in the pleadings, and that the plaintiff was entitled to raise by sale of the estates, or a sufficient part thereof, what should be found to be due for principal and interest, in respect of a charge at the time the defendant took possession thereof, and that what should be found to be due for interest, since the defendant took possession, should be answered by her personally, and he ordered that what should be found to be due for principal and interest accrued to the time the defendant took possession of the estates, and the plaintiff's costs when taxed, should accordingly be raised by the sale of the said estates, or a sufficient part thereof.

Upon this declaration in the decree, it appears to me inaccurate to state by a declaration that the defendant was only tenant for life ; and if the decree is right, these words must be qualified by attending to the circumstances, that the defendant is tenant in fee at law under the will : but supposing the principle of the decree right, the fee simple at law is clothed with the trust for some person whenever the tenant in fee shall do some act, so that in equity the defendant is tenant in fee at law, and tenant for life in equity, and some other person is entitled to the inheritance after the death of the tenant for life.

Upon a point so important as that which is decided in this case, it appears to me to be a circumstance much to be regretted, that on a record framed as this is, that point should have been determined ; but I agree that it is necessary to be determined, for the plaintiff being entitled to a charge on the estate, it would be difficult to say how the estate could be responsible for the charge so created between this lady as the tenant for life in equity, and the person, if any person there is, who is entitled to the estate, if the interest of the charge

that be kept down by the tenant for life. It was necessary, therefore, to ascertain whether the defendant was tenant for life in equity, and tenant in fee at law.

Wright
v.
Atkyns.

The will, a copy of which I have before me, is the will of Mr. Atkyns, the son of this lady, by which he gives all his manors, messuages, farms, lands, tenements, advowsons, and hereditaments, as well leasehold as freehold, in Norfolk and Norwich, or in any other town, parish, or place, next or near adjoining, with their appurtenances, and all other his real estate whatsoever and wheresoever, and of what tenure or tenures soever, unto his dear mother Charlotte Atkyns, and her heirs for ever, in the fullest confidence that after her decease, (by which he must have meant at her decease,) she would devise the property to his family; and there follow words which it appears to me are important to state, and which I observe are not part of any printed or written report that I have seen; but which have a tendency to show what the testator had in contemplation, when he used these words, "in the fullest confidence that after her decease she will devise the property to his family." After charging the premises with the payment of his debts, he goes on to say, "and I do hereby give and bequeath to my aforesaid dear mother Charlotte Atkyns, all my goods, chattels, and personal estate for her own benefit," and then he makes her his executrix. The personal estate is given by words which express to give it absolutely for her benefit. With respect to the real estate, if the former part of the will is to be looked to, it is a question of real estate only, which is given in the fullest confidence, that after her decease she will devise the property to his family. It is

[115]

Wright
v.
Atkyna.

given to her and her heirs for ever, which, as it appears to me, must vest the legal interest ; then follow words of confidence, which, if the object be certain, and the subject ascertained, are always taken in this court to create a trust.

Words of confidence, if the object be certain, and the subject ascertained, in equity always create a trust.(1)

[116]

With respect to the words of confidence, that they are sufficient to create a trust, there can be no doubt. As to the subject about which the confidence is expressed, there can be also no doubt, for the words are, "the property." As to the object, the object is described under the words, "my family," and the question is, whether the words, "my family," sufficiently ascertain the object in whose favour this confidence is expressed with respect to the subject. It is observable, that the confidence expressed with respect to the subject and object is, that she will do a certain act, viz. that she will devise the property to his family. That therefore *prima facie*, seems to import that she has till the last moment of her life the power of doing the act, which the testator expresses his confidence that she will do, and when she is doing that at the last moment of her life, the terms with reference to which this confidence is expressed *prima facie*, import that the object, in respect of whom the confidence is not to be violated, must be some object to whom she can pass the estate by devise.

On the argument and consideration of this case, I have been distressed by two circumstances: the one is, that I observe his honour, in giving his judgment, and the printed report is confirmed by the written report, states

(1) See *Bland v. Bland*, 2 Cox's Ca. 349. and note. 7 Ves. 85. & *Ibid*. 386.

Wright
v.
Atkyns.

“with respect to the cases cited, which relate to personal property, or to real and personal property, comprised in the same devise, or where the meaning is rendered ambiguous by other expressions or dispositions, they will not bear upon the question.” He farther represents correctly what lord Hardwicke said in *Pyot v. Pyot*, (a) that “the words, the Pyots, described the particular stock, and that the name stood for the stock, but did not go to the heir at law. as in the case in *Dyer*; (b) it must be nearest relations; taking it out of the stock; from which case it also differs as the personal is involved with the real; and it was meant that both should go in the same manner, and could the personal go to the heir at law?” You will observe, that if the testator had had any leasehold estate, or had acquired any prior to the time of his death, that this would have been a case of a mixed devise and bequest of personal and real estate; for it is not as the argument represents, a case of the devise of the manors, messuages, farms, lands, tenements, advowsons, and hereditaments; but the words are, “I give, devise and bequeath, all my manors, messuages, farms, lands tenements, advowsons, and hereditaments, as well leasehold as freehold,” in the manner described.

[117]

Another circumstance that has distressed me in the consideration of the case before me is this; the word “family” has been understood, and it has been insisted, that it has been used ever since the case in *Dyer*, which is confirmed by the case of *Counden v. Clerk* (c), where the real estate is given to a man “the best and worthiest of the family,” that is the heir at law of the family, and

(a) 1 *Ves.* 335.

(b) *Chapman's Case*, *Dy.* 333.

(c) *Hob.* 33.

Wright
v.
Atkyns.

A will devising real estates for life, with remainder "to the family," the heir at law is entitled under that term.

there can be little doubt, after what one sees of decisions, that if this had been a will devising the real estate to the defendant for life, with remainder to his family, that these words, "his family," would be taken to describe his heir at law. But as far as I have seen, with reference to the argument or judgment in this case, it does not seem to me to have been in discussion before his honour, or that his judgment adverts to the circumstance that this is not a case where the word "family" is to be considered with reference to the occurrence of the word in the text of the will ; but with reference to the nature of the confidence and the act to be done, in order that the person to whom the estate is devised in fee, may, if I may so express it, be capable of benefiting by the act, duly attending to the confidence reposed, in giving to the person described by the words, "my family." For unless that person is certainly described by the words, "my family," this trust cannot take effect. And, perhaps, the statement I am making is material as having some countenance in the mind of the learned judge.

[118]

It is impossible not to have been anxious in respect to this case, and in respect to a late case in *Taunton*,^(a) and another in 1 Term Reports, 437. note ; and I note it as extremely to be lamented that all the cases had not, upon each of these questions, been thoroughly looked into, when this judgment was given, because it is extremely difficult to reconcile the representations of these cases in law and equity. If any body will take the trouble to look into the case of *Spring*, on the demise of *Tücher v. Biles*, in the note to 1 Term Reports, 435., they will find Mr. Justice *Buller* disputing whether the doctrine of

(a) 1 *Taunt.* 263. 266

Wright
v.
Atkyns.

trust and confidence relates to real estate ; they will also find him stating, that where there are words of confidence that a person will give it to his relations, that it means next of kin ; and there are cases in this court that seem to go on that. In this note the case of *Hording v. Glyn*, is also referred to, in which case Sir *Samuel Romilly* and myself were afterwards concerned. The result there was, not that the widow, to whom the property was given, was bound to give it to the next of kin ; so much otherwise, that she gave it to a person of the name of Henry Swindell, who was not next of kin. He was a defendant with his father, who was next of kin, so that the son could not be next of kin, and the decree confirmed the title of the son to that part of the property which the widow had bequeathed to him, and the effect could be no more than this, that if she did not give it to the person who answered the description of the relation, that the word "relation" would operate in favour of the next of kin, with this difference, that the next of kin would take as the relations, yet they would not take in the same proportions which the next of kin would take under the statute. That principle was followed up in *Thomas v. Hole*,^(a) and in the case of *Hands v. Hands*,^(b) which was determined in 1782. It appears that the notion of the Master of the Rolls, at that day, who decided the cause, was, that although where there was a trust of that sort for relations, it might be in the power of the party in whom the confidence was reposed to disappoint the expectations of the relations, where they were next of kin, yet that unless these expectations were actually disappointed by the act of the person in whom

[119]

(a) *Cas. temp. Talbot.*

(b) *Cited 1 Term Rep. 261. 497.*

Wright
v.
Atkyns.

the confidence was reposed, they had that species of interest in the property which would entitle them to sue in this court, and to have the property secured by being brought into court, and the court would secure it from some other person not entitled to it under the trust which was created under the words of confidence. The case of *Harding v. Glyn* and *Hands v. Hands* had express reference to giving the property at the death of the person in whom the confidence was reposed. I mark the circumstance as bringing this case, as far as the power of devising goes, within the reach of the cases decided. But I do not think it is necessary to attend to the power considered specifically as a power to give by devise; for if the party has a power to give, whether the words devise or bequeath are introduced or not, as a power she must have a right to exercise the power at any part of her life, and therefore might be capable of exercising it by some future act, and that may be a future act that cannot be executed at that time, for it is to be executed in favour of persons who are then living, and who must answer the description of next of kin of the person who reposes the confidence in the person who is to do the future act. In the case of the word "relations," generally speaking, one has to observe this, that relations not only imply next of kin, but other persons who are related in much more remote degrees, and that where there is a power of giving or devising to relations, the power which reposed confidence, or expressed the trust, applies to a great variety of objects, amongst whom the power might be exercised; and yet it is not impossible that a case may exist where a testator reposing such confidence may die with only one individual surviving, who would answer the description of relation; and I think it would be found dif-

[120]

Wright
v.
Atkyns.

ficult to say, that because only one individual could be represented as the object in the favour of whom the trust was expressed, that a different construction was to be put upon such a will, from what would be put on a will in which *ex concessis* it was admitted that there were a variety of objects certainly described, or to be made certain by the act which adopted them. It would be a difficult thing that the decision of the court should be different in one case from what it would be in the other. Now, it is in some such sort of way as this that I have considered all the difficulties pressed on me against the authority of the decision of the *Master of the Rolls*, and I should have found satisfaction if I could have found in the decision assistance to my mind.

What has been said as to the power of devising real estates when it has been pressed on me, and pressed at my suggestion, is this: why should the testator have given this lady a power of devising, if by the words "my family" he only meant his heir at law? On the other hand it has been said, why should he describe her mode of leaving as a gift to be made by devise if he meant his heir at law who might be dead before her? and that argument carries weight from the reasoning of the judges in the case to which I have alluded in the Term Reports. It carries weight from the judgment, and speaking with all humility, more weight than that judgment would have given the argument if the judgment had been considered with reference to all the decisions in this court. But with respect to the first of these objections, that it is a power to devise to the heirs of the family, it appears to me that there is no difference between that case and the case that might occur where the trust is with respect to personal estate, and the per-

[121]

Wright
v.
Atkyns.

son who expressed the confidence had but one relation in the world ; or the fact that that relation might be dead before the power could be executed by will, and therefore that as a confidence or trust reposed it must cease to operate, because the trust and confidence could not be executed in the mode the testator had appointed it should. My answer to that is, that if the word "relations" is to be taken as next of kin, or if it so happen that there is no relation but the next of kin, in all cases where the power of giving personal estate is to be exercised in future, which it must be, for it must be exercised by a future act of gift or bequest ; and it appears to follow in this case that the court has overlooked the objection, or has not thought it of sufficient weight to destroy the trust, but has said that if these persons should die, and not be disappointed by any act of the party interested, notwithstanding they could not be the objects, they shall take.

[122] The result of the whole amounts to this : I pass over the case of *Harland v. Trigg*, (a) in which it was impossible that the words "my family" could mean an heir at law. I remember the case myself, and I have had frequent occasion to mention the case in *Dyer*, and the case in *Ambler*. (b) In the case of *Harland v. Trigg*, there was not a word said about family ; it was impossible to say any thing with effect ; because the argument was, that the testator had given leasehold estates to the same uses as his real estates, and had expressed that the leasehold estates should be given to his family. It was thereupon contended by those who took interest in remainder, that the testator meant that these

(a)•1 Bro. C. C. 142.

(b) *Cunliffe v. Cunliffe*, Amb. 686.

Wright
v.
Atkyns.

leasehold estates should go along with his freehold estates. Two answers were given, 1st, that he had cloathed his leasehold estates with the uses of his real estates ; and next, that the estates which were not so cloathed should go to the same uses. They were not contending for the word "family," because the testator had two daughters who were his co-heiresses at law and next of kin ; therefore, unless you made out from the context that by the word "family" he meant remainder-men, you did not advance a step. When I say unless you made it out from the context, I admit that the words "my family" have been words that have had constructions more or less large. The cases at law amount to this, that if a man devises to *A. B.* with remainder to his family, inasmuch as the court never will hold a devise to be too uncertain, unless no fair construction can be put upon it, that the heir at law, as the worthiest of the family, is the person taken to be described by the word "family." Therefore, in this case if this had been a devise to Mrs. *Atkyns*, in terms which would have regulated the quantity of estate at law ; that is, if it had been to Mrs. *Atkyns* for life, with remainder to "my family," that would have been a remainder (subject to a question whether the heir at law took by descent or purchase) descriptive of some heir at law. If that would have been so, the question arises whether the power of devising, and the fact that the heir at law may be dead before the power can be executed makes any difference : and I have alluded to the cases I have mentioned for the purpose of pointing out the difficulty of establishing consistently with the cases the doctrines laid down.

[123]

In this case the leasehold estates are expressly men-

Wright
v.
Atkyns.

tioned among the gifts with respect to which the confidence is expressed. I have observed the fact does not seem to have been taken notice of, or to have been mentioned at the bar, that the testator mentions leasehold estates, though he has none. Not that his having no leasehold estates makes any difference; for by his mentioning that she may dispose of leasehold estates, you must take him to have the same intention as to leasehold as to freehold estates. Then the difficulty occurs to which the *Master of the Rolls* alludes, and which Lord Hardwicke states in the case of *Pyot v. Pyot*; and yet this difficulty has been got over in later cases, for in the case in the Common Pleas, and in the case in the Term Reports, where the word relation is used, both courts said, that the words "my relations," relating to real estate, shall receive the same construction as with respect to personal estate. Then if they will receive the same construction as real estate, as with respect to personal estate, it is difficult to say, *per contra*, that the words "my family" shall not receive the same construction with regard to real and personal estate. I have a difficulty with respect to the decision in the year 1732, which is mentioned in the note in Taunton's Reports, before referred to, the manuscript of which I understand was from among the papers of the late Mr. Cox, where the word "family" was used, that it gave the real estate to the heir at law, and the personal estate to the next of kin. It is not necessary to say, whether that decision would not be open to considerable question. There was no real estate there, so that there could be no competition about it; but it would be too much to say, after it had been held that the word "relation," by analogy to the statute of distributions will give the real estate, that the word "family" will not

[124]

give personal estate. Whether that can be maintained, or the decision in 1732, makes no difference in this case.

Wright
v.
Atkyns.

There was a case which I have taken a good deal of pains to find out. It happened early in the period in which I have lived in Westminster Hall. It was a case in the family of a Mr. Morris, of the western circuit, whom many must remember. It is a case which I am sure would be found to bear on this, if we could get at it. It was the practice at that time of day, (I am alluding to an old period,) that you had no such doctrine in a Court of Equity as that a man was obliged to take a doubtful title. Of that there was no doubt. If a bill was filed for the specific performance of a contract, and the court compelled you to take the title; if you did not like it you applied to the House of Lords, and took its opinion on the title, and though the opinion of the House of Lords would not bind those who were no parties to the suit, it would form a precedent to go by in future. With respect to the will of Mr. Morris, there was, as I said, a question in his family, and though I cannot take upon myself to say how far it bears on this case, yet I have a strong impression on my mind that it does bear on it under some such devise as is contained in his will. An agreement was made for the purchase of the estate; the question was first discussed in the exchequer, and afterwards in the house of lords, and there "confidence" was held, as by the *Master of the Rolls* in the present case, to amount to a trust. I have not been able to trace the case, so as to state the circumstances of it in such a way as to induce me to represent it as any authority for the inclination of the opinion I have formed in looking to this case, in the midst of all the

[125]

Wright
v.
Atkyns.

difficulties with which it is surrounded. I have no hesitation in stating this case to be of so much importance and difficulty, that I should have no objection to hear it again discussed in argument, or made the subject of appeal elsewhere, in order that a point of this magnitude may be left with less uncertainty than now hangs about it. But my present opinion is, that I cannot disturb the judgment of the *Master of the Rolls*.

Rolls.
Feb. 7, 1815.

KEMEYS *versus* HANSARD.

Notwithstanding two private acts of parliament reducing younger children's portions in proportion to the other interests in the estate, the court would not enforce an

[126]
agreement entered into by one of the younger children in execution of the private acts thereby consenting to accept a stated sum in satisfaction; such agreement being inserted by the plaintiff's solicitor in a receipt from her, on paying her a small sum of money, and she being in great distress and embarrassment at the time.

By settlement, dated the 14th and 15th April, 1756, made upon the marriage of John Gardner Kemeys and Jane his wife, the father and mother of plaintiff, certain estates were conveyed to trustees, among other trusts to raise the sum of 4000*l.*, for the portions of younger children, payable at twenty-one or marriage. There were two such younger children of the marriage, Jane Gardner Kemeys and Susannah Kemeys. Jane Gardner Kemeys, in the year 1779, intermarried with Hansard, of much inferior station in life, and without the approbation of her family, and the defendant was the issue of that marriage. Hansard, the defendant's father, carried on the business of a seedsman, and afterwards failed, and was committed to the Fleet prison where he died. It appeared that the defendant's mother was left a widow, in such distressed circumstances, as to have been arrested for the amount of her husband's funeral expenses. Under these circumstances she applied to the plaintiff, her brother, for payment of her portion, who referring her to his solicitor Fownes, a verbal agreement was in 1808 entered into, by which she seems

Kemeys
v.
Hansard.

to have consented to accept the sum of 1780*l.*, on account of her portion. It appeared, that on the 24th February, 1809, Fownes paid to the widow, at his office, the sum of 20*l.* on account of interest of the said 1780*l.*, and thereupon Fownes made her sign a receipt as follows: "Received the 24th February, 1809 of J. K. "G. Kemeys, Esq. by payment of Messrs. White and "Fownes, the sum of 20*l.*, on account of the half year's "interest of 1780*l.* due to me in November last, which "said sum of 1780*l.*, I agree to accept in full of my "claims on him and his estates, and to execute a re- "lease for the same, on its being paid or secured to me." Other small payments were afterwards made to the widow, who died 1811, leaving her daughter, the defendant, her executrix. The defendant refusing to abide by the agreement, the plaintiff filed the present bill, praying a specific performance of it.

Two private acts of parliament(*a*) had been obtained by the plaintiff, but without the concurrence of, or even consulting with his sisters. The effect of these acts was to provide for a debt due from his father to the crown, and for moneys due upon mortgage, and to secure a proportionable provision as the portions of the younger children, in consequence of the reduced value of the estates. [127]

The defence made by the answer was, that 1780*l.* was not a fair proportionable part of the said portion, and that the agreement to accept it was unduly obtained from the defendant's mother, who was at the time under great distress and embarrassment in her circum-

(*a*) 12 Geo. 3. and 34 Geo. 3.

Kemeys
v.
Hansard.

stances, and that the plaintiff's conduct amounted to duress towards her.

Mr. *Leach*, and Mr. *Wetherell*, for the plaintiff, relied upon the receipt as evidence of the agreement, and upon the payments made, as constituting acts of part performance. They contended that 1780*l.* was doing proportionate justice to each of the daughters, under the acts of parliament, and that the agreement to accept it was such a one as the Court of Equity would enforce.

Sir *Samuel Romilly*, and Mr. *Dowdeswell*, for the defendant, objected to the receipt as insufficient evidence of the agreement, there being no confirmation of it. It was also improperly obtained from the defendant's mother, not being explained to her, and advantage being taken of her distressed situation. It was void for want both of consideration and mutuality according to the decisions both at law and in equity. The private acts do not bind the defendant or her mother, neither having been party to them, and there being great uncertainty as to the benefit which those acts provide for the younger children.

[128] Mr. *Leach*, in reply.

The private acts were beneficial to the defendant's mother, as without them her only remedy would have been to have redeemed the incumbrance on the estates.

The Master of the Rolls.

The bargain which was entered into might be a good one for Mrs. Hansard. I don't know how that may be.

Kemeys
v.
Hansard.

The question is, whether this court should decree a specific performance of it? Now there is abundant evidence that she entered into an agreement. It is contained in the receipt, and that will do as well as in a distinct instrument for the purpose; but I think it has not been properly introduced there. The original agreement was by parol, not very distinct in itself; and the receipt is an acknowledgment of it, which was not intended to have been given by Mrs. Hansard. She went to Mr. Fownes, not for the purpose of signing an agreement, but in order to receive a small sum of money; but which he would not pay unless she would sign the agreement. It ought to have been stated to her what she was to sign, which it was not; but appears to have been extorted from her. Neither was it any conclusive agreement. On entering into it she certainly meant to have her money down; whereas she was only paid some trifling sums. In the circumstances in which she was, it made all the difference to her that the money should be paid down. She was so distressed in her circumstances, that she appears even to have been arrested for the expenses of her husband's funeral. The plaintiff says he meant to pay her at his convenience, and that she was satisfied so to be paid the 1780*l*. But no benefit resulted to her from such an arrangement, and even the acts of parliament leave her interests in a state of complete uncertainty. I therefore think that the agreement was obtained from her under such disadvantageous terms, that this court, upon its general principles, will not enforce, nay, indeed, ought not to enforce, for the sake of the precedent. The bill therefore must be dismissed; but there being no evidence of fraud, let it be without costs.

[129]

Feb. 7, 9, 1815.

WAUGH *versus* LAND.

Tenant in common of a moiety having obtained a decree for redemption of his moiety, afterwards takes a conveyance of the equity of redemption of the other tenant in common; and then files a supplemental bill for a redemption as to that; stating that a prior conveyance of that equity of redemption by the assignees of that tenant in common who had been a bankrupt, and in which conveyance the bankrupt had joined,

[130]
was void as against the bankrupt, having been improperly made. Bill dismissed, being supported by the evidence of the bankrupt alone.

THE bill filed in this case was filed as a supplemental bill. It stated, that in 1802, the plaintiff had filed his original bill against the defendant Land, and some of the other defendants, for a redemption of a moiety of a dissenting chapel, at Leeds. In 1793, the plaintiff and Price, one of the defendants, (plaintiff and Price being dissenting ministers,) had purchased and taken a conveyance to themselves as joint tenants of a piece of ground, on which they began to build the chapel in question. By indentures of the 8th and 9th July, 1793, the plaintiff and Price mortgaged the premises, and the chapel then erecting, for 300*l.* to Pawson and Lee. The chapel was afterwards finished at a considerable expense, and by indentures of the 19th and 20th January, 1795, the plaintiff and Price, together with Pawson and Lee, who joined in assigning their interest, conveyed the ground and chapel to the defendants Land, Lonsdale, Howell, and Lawson, to secure, in the first place, the said 300*l.* and interest, thereby conveyed and assigned to the said defendants; and farther to secure other moneys advanced by them towards building the chapel, stated at 1812*l.* In March, 1795, the plaintiff and Price were declared bankrupts, by selling books, they being schoolmasters, and the defendants, Waggit, Miers, and Reynolds, were chosen assignees of their estate. Price soon after obtained his certificate. The said commission of bankrupt was stated to be fraudulent and collusive, as against the plaintiff. In February, 1799, the plaintiff brought an action of trover against the said assignees, in order to try the validity of the said commission, and having obtained a verdict therein, the commission was afterwards super-

seded by order of the *Lord Chancellor*, on the 26th January, 1802. By the decree at the *Rolls*, in Easter Term, 1807, it was declared, that the plaintiff was entitled to redeem his moiety of the said mortgaged premises, and the usual accounts were directed.

Wagh
v.
Land.

The bill now filed, after reciting the above proceedings, stated by way of supplement, that by indentures, dated the 21st and 22d July, 1807, between Price of the one part, and the plaintiff of the other part, in consideration of 425*l* secured to be paid by plaintiff to Price, the latter had conveyed to the plaintiff and his heirs all that his, (Price's) moiety or half-part of the said ground and chapel. That since the above decree the plaintiff had discovered that the said assignees had acted fraudulently and collusively in selling the equity of redemption of the said ground and chapel to the defendants, Land, Lonsdale, Howell, and Lawson. It stated, that Price was improperly prevailed upon by the said assignees to join in the said conveyance of the equity of redemption, under the persuasion, that as a bankrupt he was bound to join in the conveyance by his assignees; but that he had only executed as a formal party, without consideration, and that he never would have done so, if he had known or believed that the commission of bankrupt against him and the plaintiff was not valid, and would be superseded. The plaintiff therefore insisted, that having purchased and taken a conveyance of Price's moiety, he was entitled to redeem the same, notwithstanding the prior conveyance of the said assignees, in which Price had so joined, to Land and the others

[131]

The bill prayed, that it might be declared by the de-

Waugh
v.
Land.

cree of the court, that the deed or deeds by which it was alleged that Price had conveyed or released his equity of redemption, in the said mortgaged premises, were void as against plaintiff and Price, and that by virtue of the indentures of the 21st and 22d July, 1807, that the plaintiff was entitled to redeem, as well the moiety of Price, as the plaintiff's original moiety; and that the necessary accounts might be taken.

The answers of all the defendants, except Price, denied all the fraud and collusion stated in the bill, or that Price had been improperly prevailed upon to convey the equity of redemption, under the circumstances represented in the bill; but the same was a fair and *bona fide* sale, and that he had joined with the said assignees in conveying the same by indenture of the 21st March, 1796. Price by his answer admitted the above statement in the bill. There was, however, no evidence on the part of the plaintiff in support of the fraud and undue influence stated by the bill, except the evidence of Price, who was examined as a witness for the plaintiff, and who deposed to the effect stated in his answer.

[132] Sir *Samuel Romilly*, and Mr. *Wear*, for the plaintiffs, argued, that he was entitled by the present bill to have a decree for a redemption of the moiety which he had purchased of Price; and that the defendants should have made their objection, if there was any weight in it, by demurrer. The question as to Price's right to redeem his moiety, could not have been decided in the original cause. A decree might be made as between the defendants to the present suit, as was commonly done in causes where there are several incumbrances of the

same estate. So in bills of interpleader, decrees are made between defendants upon evidence between them.

Waugh
v.
Land.

The *Lord Chancellor*, in the course of the argument observed, that this was the first instance of a person filing a bill, stating, that another person had been defrauded of his right; that the plaintiff had bought that right, and now sued upon it. That there seemed two convenient modes of putting the question for decision, either by demurrer or by plea.

Mr. *Leach*, Mr. *Agar* and Mr. *Bell*, for the defendants, insisted that a right of this sort could not be purchased, it being contrary to the policy of the law ;(a) and that a supplemental bill could not be filed in this case, or the evidence of Price entitle the plaintiff to relief under it, even if that evidence were at all admissible.

The *Lord Chancellor*.

In this case the plaintiff and Price were originally joint tenants of the premises in question ; but that makes no difference as to the question to be decided in this suit, though it seems to have been thought that it did. [133] The original bill filed charged, that by collusion the commission of bankruptcy issued against the plaintiff and Price ; but that is omitted in the supplemental bill. The trading, however, in school books was not sufficient to constitute a trader within the meaning of the bankrupt laws, and the commission therefore was certainly bad. As to the supplemental bill, I cannot help observing, that if it was meant to claim a right to redeem a moi-

(a) Stat. 32 Hen. 8. c. 9.

Waugh
v.
Land.

ty only, it seems oddly framed for that purpose, it being difficult to know from the prayer of it whether a redemption of the whole is not claimed by it. The conveyance of the equity of redemption is material in this case. There is great difficulty as between the defendants in getting rid of the fact of Price having joined his assignees in that conveyance. The court is obliged in this case to decide as between the defendants. The case mentioned of incumbrancers is different, because there the court, by reference to the Master, first gets his report, thereby ascertaining the facts, before it decides.

I know not under what class or denomination of pleadings this bill is properly to be ranked, whether it is a bill of review upon new evidence, filed without leave of the court, or what it is. It states part of the allegations of the original bill, and alleges a discovery of fraud and collusion, as to the conveyance of the equity of redemption by Price. Not one syllable of this fraud or collusion is either admitted or proved. No passage in either of the answers has been read in evidence; and lest there should have been a slip of attention in the counsel, I have myself read the answers through, and find that no passage could have been read in evidence. Considering the case then even upon the allegations of the bill, I cannot see that fraud or collusion [134] has been practised upon Price. It is not sufficiently stated, nor indeed is it at all stated, as it should have been, that the other defendants had notice of such fraud or collusion before they became purchasers, without which no relief could be given against them. If, however, there were sufficient allegation of this, there is not the least evidence of it. Suppose Price had filed a bill, he could not himself give evidence to destroy his own

deed ; if so, his assignment to another cannot enable that other to use Price's evidence for the same purpose. The evidence of Price then is nothing at all in the case ; the allegations of fraud in the bill being denied by all the other defendants. As to his having been compelled by his assignees to join in the conveyance of the equity of redemption, no bankrupt can be compelled so to join. If a purchaser does not like the title unless the bankrupt joins, he certainly often does so, but he cannot be forced to it. As a judge, I have not, upon the whole, the least doubt that this bill must be dismissed.

Waugh
v.
Land.

A bankrupt cannot be compelled to join in a conveyance by his assignees.

Bill dismissed with costs.

WESTON *versus* HAGGERSTON.

Feb. 10, 1815.

IN taking an account in the Master's office the following mistake was made in casting up the schedules : the Master had carried forward the balance from one schedule to the next, and the balance of that to the following, and so on, through several schedules ; but instead of charging the defendant with the balance only appearing by the last schedule, which included the other balances, he had cast up all the different schedules, and charged the defendant with the amount of the whole, thereby charging him with several thousand pounds more than he ought. The defendant upon the cause coming on for farther directions was decreed to pay the sum so reported due from him. The plaintiff then enrolled his decree, after which the mistake was discovered. The question was, whether the error could be rectified upon

After enrolment of a decree, errors appearing upon the face of schedules permitted to be corrected upon motion, without a bill of review, but the court would not permit an affidavit introducing a new fact to be used for that purpose.

[135]

Weston
v.
Haggerston.

a summary application to the court, or whether the enrolment having taken place, did not render a bill of review necessary.

Mr. *Bell* and Mr. *Heald*, in support of the application when it first came on, (a) which was some time back, cited several cases from the Register's book, to show that such an error could be corrected notwithstanding the enrolment, without the necessity of a bill of review, and also referred to several authorities at law, in which mistakes in records at law had been permitted to be amended.

Mr. *Agar*, on the other side, insisted that a bill of review was necessary.

The *Lord Chancellor* thought that all errors apparent upon the face of schedules could be rectified even after enrolment; but that there could be no correction except of such apparent errors, and therefore that the mistake which had been made in the schedules in this case might be rectified.

Mr. *Agar* afterwards, on the first above-mentioned day, applied upon affidavit for the plaintiff to have some farther sums allowed him which he claimed, and which he contended ought to have been inserted in the schedules, and that as the defendant had on his part been permitted to correct a mistake in the account, a similar indulgence ought to be given to the plaintiff.

[136]

(a) This part of the case *ex relatione*.

The Lord Chancellor.

Weston
v.
Haggerston.

I remember being satisfied upon the authorities stated to me, when this case was on before, that any error apparent upon the schedules might be rectified.(1) But I am of opinion that no affidavit introducing a new fact can be permitted after enrolment. As to any error in charge or discharge appearing upon the report, it may be corrected. Though interest should be allowed on apparent balances, I think also that if those apparent balances should not appear to be real balances, the party would not be entitled to interest upon them. I cannot however send it to the Master to inquire into errors of an enrolled decree, appearing only by affidavit. In permitting the amendment which I before thought might be made, I never meant to interfere as if the enrolment had not taken place.

BOOTLE *versus* BLUNDELL.

Feb. 9, 10, 13.
1815.

AN issue *devisavit vel non* having been directed by this court, the case was tried at the last assizes for Lancaster, when the Attorney General, who had gone down special for the plaintiff, having called one witness to the will and examined him, did not call the other two; but

On the trial of an issue *devisavit vel non* directed by this court, all the witnesses to the will should be examined.(2)

(1) See *Hawkins v. Day*, 1 Ves. Sen. 189. and the order in that case. Belt's Supplement, 106.

(2) Though the practice is to examine all the witnesses, yet the will may be declared proved without it. *Powell v. Cleaver*, 2 Br. C. C. 499. When a witness is abroad, or insane, proof of his hand writing is sufficient. 5 Ves. 454. 9 Ves. 381.

Bootle
v
Blundell.

told the counsel on the other side, that he would make a present of the other two witnesses to the defendant. The defendant, however, did not examine them, being advised not to go on with the trial, and a verdict was accordingly found for the plaintiff.

Sir *Samuel Romilly* and Mr. *Roupell* now moved for a new trial, and contended that all the three witnesses to the will ought to have been examined, the rule of proceeding in this court being, that where the witnesses to a will are living they must be examined, and that an issue being part of the proceedings of this court, and not a distinct action, the same course must be pursued.

Mr. *Hart* and Mr. *Hall*, on the other side, contended that the rule of the court was a mere technical rule, confined to examinations before its own officers; that upon an ejectment at law it was quite unnecessary to examine all the witnesses to a will; and that an issue being only a mode of informing the court by *viva voce* examination, the practice at law as to calling witnesses must be followed in an issue the same as in all other cases.

The *Lord Chancellor*, however, thought that the rule of the court, where a will is to be established, as to the examination of all the witnesses, was not a technical rule. Upon an action directed, the verdict is final; but when this court sends an issue to be tried, it reserves to itself the review of all that passes. This is the reason why the motion for a new trial in the case of an issue is to be made here, though it is not so in the case of an action. (a) The court is bound generally to decide a ques-

(a) *Vide Ex parte Kensington, in re Stein, Smith, & Co. ante, 96.*

tion of devise by a jury. It was decided in a case before Lord Hardwicke, in 1737, and it is quite settled, that a will cannot be established in this court without the three witnesses to it being examined. Those three witnesses are not the witnesses of the one party or the other, but the witnesses of this court. The issue also is part of the proceedings of this court, and is so considered upon the motion for a new trial. It is not like an ejectment. There would be an inconsistency in requiring by the rule of this court that all the three witnesses shall be examined here except in cases of necessity, and dispensing with their being all examined at law. His Lordship, therefore, was of opinion that upon all such issues being tried in future, the three witnesses to the will should all be examined; but it appearing in this case, that the defendant had upon the trial given up the question as to the execution of the will, and consented that a verdict should go against him, the motion for a new trial was therefore refused.

Booth.
v.
Blundell.

NOEL *versus* WESTON.

Feb. 10, 1815.

UNDER a decree in this cause, copyhold estates had been sold, which had been charged by the will of the testator with the payment of his debts, and subject thereto an estate for life to one defendant, with remainder to another defendant in the cause, were thereby limited, one of which defendants, namely, the remainderman, had gone abroad, and so could not surrender to the purchasers. The purchasers had not been let into possession.

Motion
against pur-
chasers in the
master's of-
fice, to pay in
their purchase
money, re-
fused, the es-
tate sold be-
ing copyhold
limited for
life, and then
in re-
mainder; and
the remain-
derman being
abroad, he not
having surren-
dered.

Noel
v.
Weston.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Bell*, now moved that the purchasers might pay their purchase money into court, and argued in support of the motion, that the remainder-man, being abroad, was not a sufficient objection to it any more than the infancy of a party in the cause, who when he comes of age is directed to convey. This was done in a suit instituted for the administration of the estate of the late lord Waltham, where a sale of leasehold estate had taken place under a decree of the court, and the purchasers were compelled to take the conveyance notwithstanding the infancy of one of the parties. The order of the court constitutes a sufficient security to a purchaser. So in this case the remainder-man is before the court, and must convey.

Mr. *Leach*, for some of the purchasers, opposed the motion.

The case of an infant forms, of necessity, an exception to the general rule, otherwise no sale could take place. Purchasers too have notice of that fact when they buy. But the rule is, that persons adult must convey. Suppose a case in which no conveyance at all can be made, surely a purchaser would not be obliged to pay his money. He could not sell or assert any legal right whatsoever. But this is a case in which there is no surrender by the remainder-man. He never may surrender, or fifty years may elapse before he comes within the jurisdiction. He may then be unwilling or unable to pay the fine due to the lord before the surrender can take place, and must the purchasers run this risk? Suppose he dies without assets, it is quite clear the heir cannot be compelled to pay the fine. But in the case before the court, the sale took place under printed

conditions of sale, by the fifth of which the vendors engage expressly to procure the surrenders. Till this is complied with the application is premature.

Noel
v.
Weston.

Mr. *Benyon*, for other purchasers.

The legal estate must be admitted to be in the remainder-man, and the question therefore is, whether the purchasers can be compelled to take only an equitable title. Now there is only one exception to the general right of purchasers in the Master's office to have a legal title, and that is in the case of an infant; that exception is founded upon the fiction that parties when they buy know the state of the record, and therefore have notice of the infancy.(1)

Sir *Samuel Romilly*, in reply.

I admit that I cannot produce a case like this; but I cannot see the distinction between the case of an infant and the present one. It would be highly absurd to suppose that case depended upon the principle of *lis pendens*. This is the case of a gentleman domiciled here; but who has merely gone to a British settlement. Suppose the case of an heir, being a *feme covert*, who refused to levy a fine, yet I apprehend the court would

(1) Where the infant can be brought within the statute of 7 Ann. as a trustee, he may be ordered to convey immediately. But in other cases, the course is upon sales of estate in which he is interested, to decree that he join in the conveyance within six months after coming of age, or show cause to the contrary, and that the purchaser be let into possession in the interim. *Riggs v. Sykes*, Dick. 400. *Parfit v. Sherston*, Ibid. 801.

Noel
v.
Weston.

compel the purchaser to accept the conveyance. It has never been decided that such a title as this is not marketable, and cannot be forced on a purchaser. The admission of the tenant for life is clearly in law the admission of the remainder-man. As to the fine, if it had only been paid on the admission of the tenant for life it might be different ; but even then when the parties applied to have the moneys paid out of court, that might be arranged.

The Lord Chancellor.

[141]

The court would struggle to get over an objection to an application of this sort ; but if it is coupled with such a circumstance as that some time may elapse before the surrender or conveyance is got, it would hesitate before it made the order. In the case of an infant, the purchaser has no reason to complain. But in this case the court declares nothing upon its records as in the case of infancy. The non-compliance with the conditions of sale, may in this case annul the contract.

Motion refused.

SMITH *versus* SMITH.

Feb. 13, 1815.

Plaintiff not
entitled upon
paying the
common costs
of amend-
ment, to
change en-
tirely the na-
ture of his bill,
as by convert-

SIR *Samuel Romilly*, followed by Mr. *Belt*, moved, on the part of the defendant, that it might be referred to the Master to tax the costs of the defendant up to the time of filing the plaintiff's supplemental bill, and that the plaintiff's amended bill might be taken off the file.

The original bill was filed against the defendant as the bailiff or agent of the plaintiff, as to a moiety of certain farms, and praying an account against him upon that footing. By an order, dated the 28th July, 1820, an issue at law was directed to try whether the plaintiff was or not a mortgagee of the said moiety of the said farms. Upon the trial of that issue the jury found a verdict against the plaintiff that he was such mortgagee.

Smith
v.
Smith.

ing a prayer for an account against a bailiff into a bill to foreclose a mortgage; after an issue against the plaintiff, finding him a mortgagee.

On the 13th June, 1812, the plaintiff obtained the common order to amend his bill, thereby stating the said transaction of mortgage, and converting his former prayer of relief into a prayer of foreclosure of the said mortgage.

On the 8th December, 1812, the plaintiff filed a supplemental bill upon the said transaction of mortgage. [142] To that supplemental bill the defendant had put in an answer.

In support of the motion, it was argued, that in this case the defendant was entitled to more than the ordinary costs of amendment, the original suit having been abandoned in consequence of the issue, and an amended bill of a totally different nature, and afterwards a supplemental bill having been filed: and the case of *Bullock v. Perkins*,^(a) was referred to.

Mr. *Leach* opposed the motion, because the defendant had put in an answer to the supplemental bill, and thereby waived all objection. The original, amended,

(a) 1 Dick. 110.

Smith
v.
Smith.

and supplemental bill are to be taken together as one ; answering the supplemental bill is therefore in effect answering the original and amended bill, and the court cannot for the same reason take off the file the amended bill, and leave the supplemental bill remaining. Besides, this is not the proper time to ask for costs ; but upon the hearing, which is about to take place.

The Lord Chancellor.

I have no difficulty in saying that the defendant is entitled to all the costs sustained by him beyond what he had been put to if the bill had been originally a bill for a foreclosure, such as the costs of the issue at law, and of this application. I think that the defendants might have dismissed the first bill with costs. I cannot, however, go the length of the motion in ordering the amended bill to be taken off the file, as it is set down for hearing.

Order made.

[143]

Rolls.

Feb. 16, 1815.

LAMBERT *versus* PARKER.

Maintenance ordered upon the fair inference of intention, where legacy is given to children "when" and "as" they attain twenty one, with survivorship in case of any

RICHARD SWALLOW, the plaintiff's grandfather, by his will, dated 17th February, 1801, gave to the plaintiff's late mother, his daughter, during the term of her natural life only, an annuity or yearly sum of 200*l.* for and towards the maintenance of herself, and the education and maintenance of her children, and to be applied by her for that purpose in such proportions, manner, and

Lambert
v.
Parker.

form as she should from time to time think proper, uncontrollable of her then present or any future husband, which annuity he directed to be paid to her or her assigns, by four quarterly payments in the year; the first of such payments to take place and be made within three calendar months next after his decease; and did farther thereby direct that the receipts of his said daughter, the plaintiff, should from time to time be sufficient discharges for the said annuity or any part thereof, notwithstanding her then present or any future coverture, it being his desire that the said annuity, so thereby bequeathed for the benefit of his said daughter and her children, might not be subject to the debts, controul, or engagements of her then present or any future husband, and that upon and after the decease of his said daughter, the testator thereby gave the sum of 5000*l.* to all and every the children of her body lawfully begotten, when, and as they should respectively attain the age of twenty-one years, to be equally divided between or amongst them share and share alike; but in case one or more of such children of his said daughter should happen to die before the attainment of his, her, or their respective ages of twenty-one years, he directed that the share or shares of him, her, or them so dying as aforesaid, should go and be paid to the survivors of them, share and share alike, and as such survivors should attain their respective ages of twenty-one years, and if only one such child should live to attain the age of twenty-one years, in that case he directed the whole of the said sum of 5000*l.* should be paid to such one child, his or her executors or administrators; but in case no such children of his said daughter should happen to survive her, or having survived her, in case no such child or children should attain the age of twenty-one years, then he di-

dying under
that age, and
if all die the
legacy to
cease.

[144]

Lambert rected the said legacy or sum of 5000*l.* should cease,
 v. and sink into his personal estate.
Parker.

The plaintiffs being the infant children of the testator's daughter, now presented their petition for maintenance.

Sir *Samuel Romilly*, and Mr. *Garrat*, in support of the petition.

The legacy in this case is vested, and the payment of it only postponed; the words "when" and "as" refer only to the time of payment. It appears that the testator at all events intended that the infants should have maintenance, by giving the 200*l.* expressly for the maintenance of the infants and their mother. The cases of *Nicholls v. Osborn*,^(a) *Chaworth v. Hooper*,^(b) *Taylor v. Johnson*,^(c) *Beckford v. Tobin*,^(d) and *Acherby v. Vernon*,^(e) were referred to.

Mr. *Parker* opposed the petition.

[145] Nothing was given to the children till they attained twenty-one, with survivorship in case of their dying under that age; but they were to have the legacy when and as they respectively attained that age. The case of *Descrampes v. Tomkins*, stated in a note to *Shawe v. Cunliffe*,^(f) seems a decision of the Lord Chancellor, in point, to show that in such a case interest cannot be given for maintenance.

(a) 2 P. W. 419.

(c) 2 P. W. 544.

(e) 1 P. W. 783.

(b) 1 Bro. C. C. 82.

(d) 1 Ves. 308.

(f) 4 Bro. Ch. Cas. 149.

Sir Samuel Romilly, in reply.

Lambert
v.
Parker.

Independently of what has been before urged, there are other words in this will which support the claim of maintenance ; the testator has said, that in case no child should attain twenty-one, then the legacy should *cease* : now unless the legacy had some effect before that event, there was nothing to cease, it not having existed to any effect whatsoever.

The Master of the Rolls.

The strong argument in support of maintenance is that the testator has expressly given it during the mother's life ; and it is extremely improbable, therefore, that he intended the children should be without any provision, in case she died leaving them under age. I think, therefore, there is a fair inference from the whole of this will, that the testator's intention was to give maintenance. The words "when" and "as" do not suspend the gift ; but only the time of payment. There is too, certainly, something in the argument founded upon the word "cease" used in the will. (1)

ATTORNEY GENERAL *versus* LORD DUDLEY.

THIS was an information and bill, filed in 1809, praying that the defendants might be declared trustees of a

(1) See *Buckworth v. Buckworth*, 1 Cox's Ca. 80, and the Editor's note.

[146]
Rolls.
Feb. 18, 1815.

Purchase of trust property by trustees for their own benefit set aside after a considerable lapse of time and several assignments.

Attorney
General
v.
Lord Dudley.

leasehold estate, as having purchased under trustees, who had themselves bought the property in question in 1787, subject to the payment of 300*l.*, and interest advanced by such trustees, in 1787, for the same.

Dissenters
may sue by in-
formation in
the Attorney
General's
name, for
charity estates
belonging to
them.

James Hughes in 1782, by deed enrolled, assigned to Bunn and Sanders, and several other persons, the premises in question for five hundred years, upon trust for the society of Anabaptists, or particular Babtists, in Dudley. In 1787, the society having contracted debts to the amount of 300*l.*, put up the premises to sale, when Bunn and Sanders became the purchasers at the price of 300*l.* In 1791 Bunn and Sanders assigned to Hancox upon trust by sale, to pay himself and another creditor, the sum of 300*l.* each, with interest. In 1795 Hancox sold the premises for 911*l.*, except some small parcels which he sold to several other persons. In 1803, Lord Dudley became a purchaser for about 5000*l.* Notice was charged and proved as against the defendants, of having purchased with the knowledge that Bunn and Sanders were trustees, who had purchased the trust property.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Wetherell*, for the plaintiff, relied upon the doctrine of the court that a purchase by a trustee of trust property could not stand.

[147]

Mr. *Fonblanque*, Mr. *Leach*, Mr. *Hall* and Mr. *Heald*, for the defendants.

1. There is no rule to show that in all cases a trustee to sell shall not be a purchaser ; but only that he shall not thereby gain a profit to himself, *Whichcote v. Law-*

rence.(a) In the present case the value at the time was given for the premises. It is also too late after the great length of time which has elapsed to set aside the sale, *Campbell v. Walker*.(b) As to the casual increase of value which has since taken place, that is no ground whatsoever for relief. Only constructive notice is proved in this case which can never be equal to a direct breach of trust. 2. These dissenters have no title to sue by information in the name of the Attorney General. *Duke's Char. Uses, 125. Attorney General v. Hewer*.(c) As a bill, it is defective for the want of the necessary parties interested, it appearing by the answer that there were other purchasers from these trustees besides the defendants, and who are not before the court.

Attorney
General
v.
Lord Dud: y.

Sir Samuel Romilly, in reply.

Land or money given to maintain a preaching minister is within the equity of the statute of charitable uses.(d) There have been many other decisions to the same effect.(e) As to the want of parties from the other purchasers not being before the court, no notice being alleged against them, they are out of the question.

The Master of the Rolls.

There have been several late cases in which protestant dissenters have been permitted to sue by information by the Attorney General, where the gift or devise is clear of the statute of mortmain.(f) I think the pro-

[148]

(a) 3 Ves. 740.

(b) 5 Ves. 678.

(c) 2 Vern. 387.

(d) Stat. 43 Eliz. c. 4.

(e) 1 Eq. Cas. Ab. pl. 3.

(f) See *Attorney General v. Fowler*, 15 Ves. 85.

Attorney
General
v.
Lord Dudley.

per answer is given to the objection for want of parties. Lord Rosslyn's rule mentioned in *Whichcote v. Lawrence*, has certainly been since corrected by the present Lord Chancellor, who in one case(a) particularly says, that *Fox v. Mackreth*, either ought to have been decided in favour of Mackreth, or this court originally, and the House of Lords finally, were right in refusing an issue to try whether the estate was worth the price Mackreth gave, or was of a greater value at that time. The length of time in this case ought to weigh, and therefore the decree must be without costs.(1)

GALLEY *versus* SHORT.

Rolls.
Feb. 18, 1815.

Payment of money into a banking house to be placed to the credit of another, upon a condition; the money in the mean time to stand in the banker's books in the name of the party paying it in: it is at [149] his risk, and the loss is his if the bankers fail before the condition is complied with, though the other party had written to desire it to be paid in generally.

IN 1808, Lush executed a mortgage for 2000*l.* to Bowles and Co. In 1809, Lush sold his equity of redemption to the defendant Score, who being desirous of paying off the mortgage to Bowles and Co. applied to the plaintiff to advance the 2000*l.* and take an assignment of the mortgage, which he consented to do. An assignment of the mortgage was accordingly prepared, all objections to the title having been removed. The title deeds had been sent up by Bowles and Co. from the country to Brickwood and Co. bankers, in London; but were afterwards sent back again. The objections to the title being afterwards removed, Ward, the plaintiff's agent, went to the banking house of Brickwood

(a) *Ex parte Lacey*, 6 *Ves.* 128.

(1) See *Fox v. Mackreth*, 2 *Cox's Ca.* 320. and note, particularly *Davoue v. Fanning*, 2 *Johns. C. C.* 252.

and Co. to pay the money and take the deeds ; but found that they had been sent back again into the country to Bowles and Co. Score being in want of the money, his solicitor applied to Ward to pay it into Brickwood and Co's house, in his own name, taking their special receipt for the same, concluded that Bowles and Co. would send up the deeds when they found that the money was actually in their agent's hands, particularly as their solicitor Charles Bowles had proposed to Score that mode of payment by the following letter to him : " Shaftesbury, 28th June. Dear Sir, Lush's mortgage, Messrs. Bowles and Co. will not allow Mr. Bowles to send these deeds to London till they are apprised of the principle and interest being paid into their house in town. If the money is ready, perhaps Mr. Ward would not object to sending the bankers a draft, at a few days date, upon receipt of which they would immediately send the deeds to him, or as he may direct; or if he does not approve of this mode, he can pay the amount into Brickwood's house, and take an accountable receipt. I am, &c. P. M. Chitty : " he being the clerk to Mr. Bowles. Price having prevailed on Ward to make the payment in the manner proposed by him, on the 5th July following gave Ward the form of a receipt under which he conceived the money might be safely paid in as follows: " Received of Mr. Ward two thousand pounds, to be placed to the credit of Messrs. Bowles and Co provided they deliver to said Mr. Ward the title deeds of Mr. Score, which now are or lately were in their possession, on or before the 15th instant, otherwise the said 2000/- to be in our hands on account of said Mr. Ward." Ward approving of the receipt, on the said 5th July went to the banking house of Brickwood and Co. and paid

Calley
v
Short.

in the 2000*l.* ; but Ward, conceiving that if the 2000*l.* were placed to the credit of Bowles and Co. he should have some difficulty in receiving it back again from Brickwood and Co. he suggested at the banking house that the money had better be placed in his, Ward's name ; which being assented to, the entry of the said sum was accordingly made in the name of said Thomas Ward, who also took a receipt as follows : " Received the 5th " July, 1810, of Mr. Ward 2000*l.* to be placed to the " credit of Messrs. Bowles, provided they deliver to the " said Mr Ward the title deeds of Mr. Score, on or be- " fore the 15th instant, otherwise 2000*l.* to remain in " their hands on account of said Mr. Ward. J. and J. Brickwood, J. Ranier and Co." On the following day Brickwood and Co. stopped payment, and on the 7th July, a joint commission of bankrupt was issued against them, and assignees were chosen. On the day the money was paid in, Brickwood and Co. wrote to inform Bowles and Co. of it, that it had been paid into their account, who sent off the said Charles Bowles with the deeds to carry them to London ; but he stopped at Salisbury, was there informed of the failure of Brickwood and Co. and proceeded no farther. On the 10th July, Bowles and Co. became bankrupts, and their assignees got possession of the deeds.

The bill prayed that the plaintiff might be declared to have rightly paid the said sum into the bank of Brickwood and Co., according to the authority and directions of Bowles and Co., and the defendant Score, and that the said sum might be decreed to be carried to the account of Bowles and Co. in the books of Brickwood and Co., as the same stood at the time of their bankruptcy ; and that the plaintiffs might have the benefit of

Calley
v.
Short.

the mortgage, and that the assignment and title deeds might be delivered up to the plaintiffs; or if the court should be of opinion that, under the circumstances, they were not entitled to an assignment of the mortgage, and the delivery up of the title deeds by the defendant, the assignees of Bowles and Co., then that the defendant Score might be decreed to redeem the mortgage to Bowles and Co., and to make a valid mortgage of the premises to the plaintiff, and to deliver up the title deeds to them, or that he might be decreed to pay the said sum with interest thereon, from the 5th July, 1810, when the same was advanced.

The case was argued by Mr. *Fonblanque*, Mr. *Cook*, and Mr. *Heald*, for the plaintiff; by Mr. *Bell*, for the defendant Score; by Mr. *Leach*, and Mr. *Trower*, for the assignees of Bowles and Co.; and by Sir *Samuel Romilly*, and Mr. *Tinney*, for the assignees of Brickwood and Co.

The Master of the Rolls.

This case must be decided without any reference to the state of the account as between Bowles and Co. and Brickwood and Co. The proposal of Bowles and Co. was, that if the money was paid into their account, or if a short cheque was given for it, it should be as if it was paid to themselves, and that the mortgage deeds should be delivered up, upon the money being so paid. But Mr. Ward does not comply with this proposal. In effect he said this: "I will not part with the money absolutely, nor will I give a short cheque for the money; but I will only pay it in conditionally." He does so pay it in to the banking-house of Brickwood and Co., pro-

Calley
v.
Short.

viding and taking care that even the entry of the money in the banker's books should be in the name of him, the said Thomas Ward. This being so done, the money in contemplation of law, therefore, remained the money of Ward until the contingency happened, upon which it was to belong to Bowles and Co. No act was afterwards done by which Bowles and Co. adopted such mode of payment. They never engaged or consented that the money should be remaining at their risk, and that they would deliver up the deeds whether the money was forthcoming or not. They did nothing to transfer the risk from Ward to themselves. The loss, therefore, is the loss of Ward, and not of Bowles and Co.

The case as between the plaintiff and Score stands precisely on the same footing as between the plaintiff and Bowles and Co. If the payment into the banking house of Brickwood and Co. was not a payment to Bowles and Co. then it was not a payment by the plaintiff to Score. The consequence therefore is, that the bill must be dismissed.

Feb. 21, 1815.

LLOYD *versus* PASSINGHAM.

Bill to set aside a compromise, upon the discovery of a forgery, unknown to the plaintiffs at the time of the compromise being entered into, dismissed un-
[153]
der the circumstances.

IN 1746, Gwin Lloyd married Sarah Hill, sister of Sir Rowland Hill, Bart. and in the affidavit by which the license was obtained for the solemnization of such marriage, the said Gwin Lloyd is described to be a bachelor. By deed, dated the 12th March, 1746, made prior to the said marriage, the said Gwin Lloyd conveyed his estate in settlement upon the said marriage, and the issue of it. There was no issue of the marriage,

and Gwin Lloyd dying in 1774, Catharine Lloyd and Mary Lloyd, his sisters and co-heiresses at law, entered into possession of his estates. In 1794 an ejectment was brought by the defendants to recover the said estates as the grandsons of the said Gwin Lloyd, by a first marriage between him and Elizabeth Taylor, in 1740. On the trial of the said ejectment, in 1794, a book, kept for the purpose of registering marriages in the Fleet prison was produced as evidence of the said marriage, and which contained the following entry: "No. 658. 1740, November 24th, Gwin Lloyd, of Hendwr. Co. of Merioneth, Esq. and Elizabeth Taylor, of St. James's, Westminster, B. and S. Pr. Wm. Wyatt." A register of baptisms in the parish of St. Pancras, for the year 1741, was also produced containing the following entry: "Elizabeth, daughter of Gwin and Elizabeth Lloyd, September 27, 1741." The defendants claimed as the issue of the said daughter Elizabeth, mentioned in the said register of baptism, and who intermarried with Robert Passingham, deceased. Upon the said evidence of the legitimacy of the said Jonathan and Robert Passingham, the jury upon the said trial found a verdict for them. By articles of agreement, of the 20th August, 1794, a compromise was entered into between the said parties.

Lloyd
v.
Passingham.

The Fleet
book of mar-
riages, not
evidence as a
register.
See 16 Ves.
50. S. C.

The bill was filed, stating, that since the said compromise had been entered into, the plaintiffs had discovered the said entries in the book of Fleet marriages, and in the register of baptisms, were forged by the de-

(1) The report in 16 Ves. is upon a motion made in a previous stage of the cause. See also 3 Mer. 697.

Lloyd
v.
Passingham. defendants or one of them, and prayed that the said compromise might be set aside.

[154]. It was proved on the part of the plaintiff, that Robert Passingham, who had been clerk to an attorney, went with William Kendray, in July or August, 1794, to St. Pancras church; that while the said Robert Passingham remained in a field opposite the church, Kendray examined the register book, and took a sheet of paper and wrote out the names of the baptisms contained upon a particular page, adding thereto a name upon the fresh paper, afterwards rubbing out the former names with a pumice-stone and India-rubber, and entering the fresh leaf with the additional name in the book. There was also evidence of a subsequent confession of the forgery by Robert Passingham.

The Defendant Robert Passingham demurred to the discovery sought by the bill which went to criminate him. The defendant Jonathan Passingham, by answer denied all knowledge or belief of any forgery; asserted the said marriage between Gwin Lloyd and Elizabeth Taylor, and that Elizabeth, the daughter was brought up by Gwin Lloyd; but that in 1762, in consequence of her marriage with Robert Passingham, her father took offence and discarded her. He farther stated, that he and his brother were both well known to Catherine Lloyd and Mary Lloyd, who contributed to their maintenance and education, and purchased commissions for them in the army. That in August, 1783, the defendant, on his return with his regiment from America, was on a visit to his aunt Catherine Lloyd, who then repeatedly told him that she had a great secret to disclose to him; and that she might not be overheard, took him

to an alcove in her garden for the purpose of revealing to him; but that after talking of her brother, the said Gwin Lloyd, she burst into tears and said, "I cannot tell you now." The defendant farther stated, that he had been informed and believed that Gwin Lloyd in his last illness repented of his conduct towards his said daughter, and sent for his sister Catherine Lloyd, who delaying to come to the said Gwin Lloyd, found him when she arrived, upon the point of death, and only able to say to her, "you have come too late, but you know all, and do justice."

Lloyd
v.
Passingham.

[155]

There was some evidence on the part of the defendants of reputation of the marriage, and of declarations of Gwin Lloyd, in support of his marriage with Elizabeth Taylor.

The *Lord Chancellor* gave his judgment on the above day, the cause having been argued some time before. He expressed his opinion to be, that the book of Fleet marriages could not be read as a register, not having been compiled under public authority, and therefore was not legal evidence; and that Lord Kenyon's opinion to the same effect was well known. The evidence of reputation of marriage, however, ought not to be weakened by the circumstances of the book not being evidence, and he thought the case might have been left to the jury upon that evidence. In this case there was no imputation of fraud or improper conduct, which could fairly be charged upon the defendant Jonathan Passingham, the elder brother. It is true, that in *Hugenin v. Baseley*,^(a) his Lordship had declared his opinion, that

(a) 14 Ves. 273.

Lloyd
v.
Passingham.

[156]

interest obtained through the frauds of a third person, could not be maintained. But it would be carrying the principle too far to extend it Jonathan Passingham, who had innocently acquired his interests, and had afterwards sold them to innocent purchasers. As to directing an issue at law, it was difficult to know what sort of issue could be framed to suit the case, and at all events he thought it could only be upon certain terms. No terms were, however, offered by the plaintiffs. Valuable demands were certainly given up on the part of the defendants by the compromise, as releasing the by-gone rents and profits, &c. He was of opinion, under all the circumstances of the case, that it was too hazardous to disturb the compromise; and that the bill should therefore be dismissed without costs.

—————

Rolls.
Feb. 22, 23,
1815.

GOWER versus EYRE.

Direction to trustees to cut trees in aid of testator's real and personal estate, held not a trust but a mere power, upon the whole of the will. Tenant for life entitled to timber for repairs cannot sell the same to reimburse herself expenses incurred in repairs.

SIR JAMES EYRE, Knt. late chief justice of the court of Common Pleas, being seized in fee, by indentures of marriage settlement, of the 13th and 14th April, 1791, conveyed to trustees to the use of himself for life, without impeachment of waste, remainder to the use of dame **Mary Eyre**, his intended wife, if she should happen to survive him, and her assigns for her life, and immediately after the decease of the survivor of them, to the use and behoof of the said Sir James Eyre, his heirs and assigns forever. There was no issue of the marriage.

Sir James Eyre, by his will, dated 20th February, 1789, duly attested, devised all and singular his real

Gower
v.
Eyre.

and personal estates to trustees, their heirs, executors, administrators and assigns, upon trust, in the first place to pay his debts, and in the next place to convert such parts of his said personal estate as the trustees of his will should not in their judgment require to remain in specie into money, and to invest such money in government or other securities, and to permit his said wife to receive to her own use the clear rents and profits and produce of the said real and personal estates, during her life, and after her decease to permit Thomas Eyre to receive the same during his life, and after his decease to permit his two sisters, Frances Edgill, and Maria Eyre, jointly, and the survivor of them, to receive the same during their lives, and the life of the survivor of them, and after the decease of the survivor of them, in trust for the said Thomas Eyre, his heirs, and assigns forever; and he thereby directed that the said trustees should have power to cut down and sell such of the timber trees growing upon his estates as should be ripe for cutting, in aid of the fund of his real and personal estate, and it having been, as the said testator declared by his will, one of his objects to increase the stock of timber on his estates, and to nurse up great numbers of young plants, which might from time to time require thinning, or to have trees not yet arrived at their full growth taken down, in order to give the young plants air and room to grow; he desired that his said trustees would employ a proper person to look over the timber occasionally, and to see that the young plants were properly thinned, and had air and room to grow.

[157]

Sir James Eyre having died on the 6th July, 1799, the defendant, his widow, elected to abide by his will.

Gower
v.
Eyre.

By indentures of the 7th and 8th August, 1807, the reversion of the premises in question was conveyed to the plaintiff in fee, subject to the life estate of the defendant, dame Mary Eyre, the widow.

[158] The bill was filed, charging that the defendant had cut down a great number of timber trees, and sold the same for a considerable sum of money, and the bill prayed that an account might be taken of the value of the same, and for an injunction from cutting more timber.

The defendant by her answer stated, that between the death of the testator and the conveyance to the plaintiff, she, from time to time, expended very considerable sums of money in necessary repairs on the premises, and that the mansion-house, from age and the original construction of the same, required and still requires continual and expensive repairs, and that she expended such sums of money as aforesaid, in full faith and confidence that the trustees would have felled timber according to the condition in the testator's will, sufficient to defray the expense of such repairs, and would have reimbursed her out of the produce thereof, to the full amount of the payments so made by her as aforesaid ; and that the defendant previously to the said 8th of August, 1807, frequently through her agent applied to the said trustees, and requested them to give the necessary directions for the fall of such timber, and to apply the produce thereof towards payment of the sums so advanced by her as aforesaid ; but the said trustees wholly neglected to take any steps therein, and under the circumstances aforesaid, she was advised, and she submitted that she was justly and truly entitled, under and by virtue of the said will of sir James Eyre, as stated in the bill, to cut

Gower
v.
Eyre.

[159]

down or fell such a quantity of timber as should be sufficient to defray the expenses so incurred in repairs as aforesaid, and she accordingly, for the purpose of answering the annual expenses which have been incurred in the necessary repairs of the said mansion-house, and other buildings, had caused to be cut down and felled in each year, from the year 1808, such a number of timber trees as by the produce thereof were sufficient to pay off and discharge all and every the sums and sum of money as were or was at the end of each year respectively due and owing to such persons as had been employed by her in such repairs as aforesaid.

The cause was heard upon bill and answer.

Sir *Samuel Romilly*, and Mr. *Horn*, for the plaintiff, contended, that the widow had no right to act as she had done, and particularly was not authorized to cut timber, and sell the same for the purpose of reimbursing herself any expenses she had been put to in repairs.

Mr. *Leach* and Mr. *Wingfield*, for the defendant, argued, 1st. That under the words of the testator's will the widow was entitled to cut timber fit for cutting, and that the produce thereof was by the express terms of the will in aid of the fund of his real and personal estate, in the hands of his trustees for the general purposes of his will, and that if the defendant was answerable to any body for the produce of the timber cut and sold, it was to such trustees, and not to the plaintiff: 2dly. That the defendant having expended money in repairs was entitled, under the circumstances, to repay herself out of the moneys which the timber had sold for.

Gower
v.
Eyre.

Sir *Samuel Romilly*, in reply.

[160]

The words of the will give the trustees power to cut, but do not direct them to do so. It is not imperative upon them. As to the fund which the produce is directed to be in aid of, the terms of the will are, being "in aid of his real, and personal estate;" how can it be said that the timber, or the produce of it, belongs more to the personal, than to the real estate, which the plaintiff has purchased? The defendant's claim goes in effect to the whole of the timber on the estate; whereas it is the declared object of the testator to increase the stock of timber on his estate. Although the defendant might have been entitled to timber for necessary repairs, that does not give her a right to sell timber.

The Master of the Rolls.

The real question in this case is, whether it was a trust or a power given to the trustees by the testator's will? If it was a trust, all the timber upon the estate ripe for cutting must be felled. If it was only a power, then the trustees were to exercise a discretion as to what timber they should cut.

Now it seems to have been the testator's intention that his estate should become a well-timbered estate. I think that consistently with this declared object of his, it would be difficult to convert the words of this will into a trust.

Mr. *Leach* requested that the case might stand over in order to see whether he could not find some authority in his favour upon the other point.

The following day he mentioned to the court that he had not been able to find any such authority.

Gower
v.
Eyre.

The Master of the Rolls.

Upon the other point, it is laid down in the books, and particularly by my Lord Coke,^(a) that a tenant cannot cut down trees for repairs and sell the same; he must use the timber itself in repairs, the sale being waste. *Lee v. Alston*^(b) was also a case of this sort in equity, in which the tenant for life, punishable for waste, with power under an enclosing act to mortgage for the expence of the inclosure, felled timber and applied the produce instead; but was decreed to account to the owner of the first estate of inheritance. [161]

Decree according to the prayer of the bill.

REEKS *versus* POSTLETHWAITE.

*Before the
Vice Chan-
cellor.
Feb. 22, 1815.*

JOHN REEKS, the father of the plaintiff, in 1763 made a conditional surrender of the copyhold estate in question to William Adams, to secure the sum of 30*l.* with interest. William Adams died in 1766, without having disposed of the same by his will, and having appointed Martha Adams, his eldest daughter, and the defendant's

Bill for the redemption of a mortgage after twenty years, upon the evidence of a conversation proved by one witness only, dismissed. His Honour, however, was of opinion that parol evidence was admissible in such cases.⁽²⁾

(a) *Co. Lit.* 53. b. (b) 3 *Bro. C. C.* 37. 1 *Ves. Jun.* 78.(1)

(1) And 1 *Br. C. C.* 194. where the point is more fully discussed.

(2) See *Whiting v. White*, ante, p. 1. and note.

Reeks
v.
Postlethwaite

wife, his executrix, and residuary legatee. In the month of December, 1767, Nanny Adams the youngest daughter of the said William Adams, and who was his heir according to the custom of the manor of which the premises were held, was admitted subject to the mortgage. Nanny Adams afterwards departed this life without issue, leaving her sister Martha Adams, the wife of the defendant, her customary heir. In May, 1777, Martha, and the defendant her husband, were admitted to the said copyhold premises, subject to redemption. John Reeks, the mortgagor, died in 1767, leaving Martha Reeks his widow, and the plaintiff, then an infant, [162] his only son and customary heir. John Reeks was at the time of his death in possession, and Martha Reeks, his widow, continued in such possession until the year 1769, when the defendant Postlethwaite brought an ejectment against her, and recovered possession of the said copyhold premises. In 1773, the plaintiff attained his age of twenty-one years.

The bill charged, and it was proved by the evidence of a single witness only, of the name of Thomas Edgecombe, that in the month of August, 1810, he was employed by the plaintiff, as his solicitor, to make application to the defendant Postlethwaite, respecting the redemption of a copyhold estate, which had been mortgaged by the plaintiff's late father, to the late father of the defendant's wife, and thereupon he did accordingly, on the 28th August, go to the place where the defendant resided, and told the defendant that he was directed by the plaintiff to make application to him respecting the estate which had been mortgaged by the plaintiff's father to the father of the defendant's wife; and the witness requested that the defendant would make

out an account touching the said estate as between Reeks
v.
Postlethwaite
mortgagor and mortgagee, in answer to which the defendant said, that his papers were at Mr. Johnston's at Chichester, and that as he was then busy, it being harvest time, he would in about a month meet the deponent at Chichester, and would previously write to him to fix the day, and that he wanted nothing but what was fair; and that defendant farther said, that Reeks, meaning the plaintiff, had better in the mean time call a court to take up the said estate, upon which the witness conceiving that there would be a considerable balance due to the plaintiff, said to the defendant, that it would be better to settle the accounts first.

The bill which was filed in June, 1812, prayed that the plaintiffs might be at liberty to redeem the said premises, and that the usual accounts might be taken. [163]

The defendants, by their answer, denied that when Edgcombe came to them, the defendant Postlethwaite promised to make out the accounts, or that he did make out any such accounts, and stated, that by the papers which he then said were with Mr. Johnston, he meant a surrender, bond, promissory notes, and an agreement entered into with a person of the name of Cawley, and that all he, the defendant, meant or intended by proposing or promising a meeting with the plaintiff's solicitor was, that after the defendant had an opportunity of inspecting the said papers, he would explain to the plaintiff's solicitor what had formerly passed or been done relative to the said copyhold estate; and the defendant farther stated, that when in the course of the said conversation the plaintiff's solicitor affected to treat the said copyhold estate and premises as the property of his cli-

Reeks
v.
Postlethwaite

ent, he, the defendant, being fully satisfied and convinced that the same were no longer redeemable, but were the defendant's own absolute property, observed to the said solicitor that the defendant wanted nothing but what was fair and just, and said, or advised, that if the said premises were the plaintiff's property, he had better in the mean time call a court, and take the land, the defendant in the mean time being well aware that the plaintiff could not call a court, or take up the land, having no right or title whatever to be admitted to the same; and the defendant thereby intending to reply ironically to the assertions of the plaintiff's solicitor, and by no means intending to convey the idea that the said estate and premises were in the defendant's judgment the property of the plaintiff.

[164]

The *Vice Chancellor* gave his judgment on the 22d February, 1815.

This is a bill to redeem, filed forty-nine years after the date of the mortgage, forty-three years from the time of possession taken by the mortgagee, and thirty-nine years from the time of the plaintiff's coming of age. The length of time therefore which has elapsed is abundantly sufficient to defeat the claim, unless a conversation which took place can be depended upon. The question in this case is, whether parol evidence of conversation had with the mortgagee in possession, shall be sufficient to set up a right to redeem, which is otherwise gone. There is but one case in which such evidence has been admitted, for that purpose, which was the case of *Perry v. Marston*,^(a) and in which it was

(a) 2 Bro. C. C. 397.

admitted, certainly, under peculiar circumstances, the conversation there taking place after the bill and answer filed; but Lord *Kenyon*, then *Master of the Rolls*, notwithstanding, thought it had such weight, that he must decree a redemption upon it. It is true that decree was reversed upon appeal to the *Lord Chancellor*; but that reversal did not affect this point, for it went altogether upon the effect of a surrender. There was a subsequent case of *Whiting v. White*,^(a) before Sir *Pepper Arden*, which I have been favoured with two manuscript notes of, one by Master Alexander, and the other by Mr. Owen, by which the *Master of the Rolls* appears to have questioned the propriety of admitting parol evidence being received at all in these cases, and he also observed, that Mr. Brown, in his report of that case had not stated all the evidence. I have taken the trouble to examine the original depositions in the six clerk's office, in the cause of *Perry v. Marston*, and by which it appears that several witnesses were examined, and from their evidence, the defendant had certainly admitted that he had got a regular account of the rents received, and of the money expended by him on the buildings, and that he was ready to settle at any time.^(b)

Reckx
v.
Postlethwaite

[165]

(a) See that case reported, ante, p. 1.

(b) I have been favoured with the deposition copied by order of the *Vice Chancellor* from the Register's book in the above cause of *Perry v. Marston*, and which are as follows :

" John Linton, corn factor, on the part of the plaintiff deposed, that in June, 1780, he saw the defendant at the door of Farmer *Perry's* house, desired to hear what passed. Farmer *Perry* asked the defendant if he had made out his accounts, which deponent understood to be accounts in the estate in dispute with his brother, to which defendant replied, yes, they are very readily made out, for I have an exact account of every thing from the beginning to this time, both as to the rent received, and of money expended in

Reek
v
Postlethwaite

Lord *Alvanly*, in *Whiting v. White*, does not cite any authority or case for his opinion against admitting parol evidence in these cases. The point, however, was

building, and told Farmer, that if his brother would appoint a time, and bring an attorney with him, the said accounts should be settled. That Perry thereupon proposed, that the defendant should appoint such time for settling the said accounts; but defendant refused so to do, and desired the same might be appointed by the brother, and notice given to him thereof, and that the said defendant would meet his brother accordingly."

Benjamin Homer, another witness, stated, "that the defendant John Marston, expressed much concern that the proceedings should be carried on against him, and repeatedly declared that he knew the plaintiff Richard Perry was heir at law of the estate, and wished not to expend any money in law, but to put an end to the suit, though he said he believed it to be in his favour, alleging that he had kept a regular account of the receipts of the rents and profits of the mortgaged estates and of the money disbursed in repairs, for a long course of years, or spoke words to that or the like effect, of which the said defendant made many representations at the door and in the house of this said Farmer Perry, in his and this deponent's hearing."

Mary Homer, widow, another witness, stated, "that three years since last spring, to the best of her remembrance as to the time, this deponent and the said plaintiff Richard Perry, being at the house of Farmer Perry, in the liberty of Bilston, the defendant John Marston came there, and entered into a conversation with the plaintiff Richard Perry, and with the said Farmer Perry, and his wife, respecting a copyhold estate at Bilston, which this deponent understood to be in mortgage to the said John Marston, and to which the said plaintiff claimed a right or title. That in such conversation the said defendant John Marston several times acknowledged and declared, in the presence and hearing of this deponent, that the said copyhold estate was in mortgage to him, and that the said Richard Perry was the owner thereof, and the said John Marston repeatedly asked the said Richard Perry why his father Joseph Perry did not redeem the mortgaged premises in his lifetime, and why he, the said Richard Perry, did not do it since his decease, or come and make the matter up with him, the said John Marston

again brought into discussion in the case of *Lake v. Thomas*,^(a) and which was argued by Master *Alexander*; but Lord *Roslyn*, before whom that case was, *Reeks v. Postlethwaite*

without any law, or used words to that or the like effect; to which the said plaintiff, Richard Perry answered, that his father was too poor to raise money to redeem the estate, or he certainly would have done it, and paid off the mortgage, and that he the said Richard Perry had not then any other way of recovering the estate than by filing a bill in chancery against him, the said John Marston, for which he had given orders; or spoke words to that or the like effect."

Farmer Perry, another witness, stated, "that in the year 1780, and in or about the months of March or April in that year, to the best of this deponent's recollection, the defendant John Marston came to this deponent's house, (he, this deponent, then keeping a public house,) and there asked this deponent, why this deponent's father did not pay off the mortgage in his lifetime, (meaning, as this deponent then understood and believeth, the mortgage which was then on the buildings and premises now in dispute in this suit,) to which this deponent replied, that he, this deponent's father, was always poor and unable to pay off the said mortgage; that the said defendant then asked this deponent why this deponent's brother, the plaintiff, did not come and settle the matter, without going to law; that this deponent then asked the said defendant if the plaintiff would settle the matter with him, whether he, the said defendant, would be accountable for the rents received from the said premises and interest for the same, to which the said defendant answered, that he would, for that he had got a regular account of the rents received and of the moneys expended on the said buildings, and that he was ready to settle at any time. That in the month of May or June, in the said year 1780, the said defendant again called at this deponent's house on horseback, when they had a farther conversation about the premises in question, in which the said defendant asked this deponent why his brother, the said plaintiff, would not come and settle the matter without law; that he, the said defendant, was ready to compromise the same on his part; that at the time last before mentioned, the said defendant asked this depo-

(a) 3 Ves. 17.

Reeks
v.
Postlethwaite

[169]

said, that with respect to the objection that nothing but writing would do, he would not decide it without farther consideration. In the absence then of authority, let us consider the point upon principle. The right to

ment to ask the plaintiff to appoint a time for him, the plaintiff, and his attorney, to meet him, the defendant, to settle the said matter ; that he knew that the plaintiff was heir to the premises, but that the length of years was in favour of him the said defendant, when this deponent asked the said defendant if his accounts were ready, to which the defendant replied, that he had always an account ready by him of the rents of the premises received, and of the moneys expended thereon ; that the said defendant, after a conversation between him and this deponent, to the effect after mentioned, whilst he, the said defendant, sat on horseback as aforesaid, alighted from his horse, and came into this deponent's house, and stayed there a very considerable time, but nothing passed between the said defendant and this deponent on this subject, after he, the said defendant so alighted from his horse, and came into this deponent's house as aforesaid, save a repetition of what is before mentioned to have passed between them whilst he, the said defendant, sat on horseback, at this deponent's house as aforesaid, or of some part thereof."

Hannah Perry, wife of Farmer Perry, another witness, stated, " that three years since last spring, to the best of her remembrance as to the time, the said complainant Richard Perry, and the defendant John Marston, were in conversation at her husband's dwelling-house, respecting the copyhold estate and premises in question, and which from such conversation and other information this deponent understood was in mortgage to the said John Marston, and to which the said plaintiff Richard Perry set up some right or title ; and the said defendant John Marston did then, in the presence and hearing of this deponent, and of Mary Homer, this deponent's mother, ask the said plaintiff Richard Perry why his father did not pay off the mortgage on the said estate and premises in his lifetime ; but this deponent being busily employed in drawing and delivering out ale did not hear what answer the said Richard Perry gave to such questions."

redeem arises upon the original contract between the parties, being by the very terms and upon the face of the conveyance itself. It is true, that when the time specified is elapsed, that right is gone at law ; but not in equity. That gets rid entirely of the objection of the statute of frauds, for the contract was in writing, and the right of redemption was reserved by that contract. To consider then, next, the rule as to twenty years barring the right of redemption ; the first question is, is it an absolute rule ? No ; it is a qualified rule, and depending altogether upon circumstances. Numberless cases might be cited as to that, first, where there have been disabilities of the party, as infancy, coverture, beyond sea. Now, writing is not necessary to prove these disabilities, and it would often be impossible to procure it ; parol evidence of them is always received. Next, are disabilities the only cases in which the rule is departed from ? No ; receiving interest, keeping accounts, treating it in any will or deed as a mortgage, will do. Such acts, and others of the sort then, are also sufficient to take the case out of the rule, and which may be solemn and deliberate acts, or not, according as the party is attending or not attending to what is doing. I admit, that to acknowledge it was originally a mortgage, is nothing at all ; that is *ex concessis* : and conversation, therefore, admitting that fact, cannot carry it farther than the original deed between the parties carries it. There must be evidence that it is a subsisting mortgage. Now, with respect to every one of the acts, in all the cases in which a redemption has been decreed after twenty years, I would ask how they are to be proved ? By the law of evidence, must be the answer. By writing only ? I ask, where is the law which says that ? What precise act, then, will be sufficient ? The answer

Reeks
v.
Postlethwaite

[170]

Reeks
v.
Postlethwaite

must be, *any* precise act. So with respect to the statute of limitations, I may show after twenty years an actual entry by me, or an acknowledgment from the party of his being my tenant. So with a mortgagee, the acts need not be done with the other party; his own acts, the mere *ex parte* acts of the mortgagee will be sufficient. Cases of part performance constitute another class of cases in which parol evidence is received respecting interest in land: so cases of trust. If you tie a party down to written evidence, great injustice would often happen. On the other hand, *Perry v. Marston* is certainly a case showing the danger of setting up parol evidence. But we must take care of the principal. To say there is danger of perjury amounts to little; because there is danger of perjury in all parol evidence, and the objection would therefore go to do it away entirely. An acknowledgment of a debt of a hundred thousand pounds, rights of way, easements, water-courses, and numberless other cases, all of them often of immense value, depend upon this sort of evidence. All the court can do, is to watch and take care of it, when competent in its nature. Look to the danger the other way, that is, that if you were to say, that after twenty years there shall be no parol evidence for a redemption. A mortgagee may have amused his mortgagor every day with promises of settling; suppose, even interest to have been paid, but which was only to be proved by parol. How easy would it be, in such cases and many others which might be put, for the mortgagee to draw on the mortgagor till twenty years were elapsed, and then to hold him at defiance. It seems to me, therefore, to be impossible, reasoning it *a priori* to say that parol evidence is, upon principle, inadmissible to found a right to redeem after twenty years; but at the same time it must

Reeks
v.
Postlethwaite

in every case depend upon the nature of that case, and it seems to me that the facts of the case must in these cases of mortgage, as in all others, be tried by the rules of evidence. I have sifted the case to the bottom, from respect to what was said by Lord *Alvanley* and Lord *Rosslyn* upon the subject; but there being no case rejecting parol evidence, I think it must be received.

The next consideration then is, as to the sufficiency of it in this case. A conversation between the attorney of the mortgagor, and the mortgagee and his wife, there being nobody to contradict him, must be looked to with considerable caution. It is true, that in this case the witness is not now the solicitor of the plaintiff; that he might also have been less unequivocal in what he says, and indeed the defendant in his answer confirms his evidence; but putting a different construction upon the words used. The conversation happens in the midst of the defendant's harvest, when the witness demands the mortgage account. The answer is material, because it is postponing the discussion of the subject; his afterwards saying, that he wanted nothing but what was fair, is admitting nothing at all, but leaving the question, as to what was fair, perfectly undecided. By his answer he has sworn, that by the mention of papers, he meant, not papers to make out a mortgage account, but a surrender bond and other writings. He might well mean his mortgage deeds and papers. But how can this be considered as a clear deliberate acknowledgment of uniformly treating the estate as a mortgage interest? The words do not naturally import it, or necessarily bear it. Then as to the words which follow, that the plaintiff had better in the mean time call a court to take up the estate. This is strange, if it is to be understood as advice to the solicitor from the other party himself. Put-

[172]

Reeks
v.
Postlethwaite

ting the other sense upon it, that the defendant meant to tell the plaintiff to call a court and get his estate from him, it is impossible to say that in so understanding it, the defendant could be informed of his rights, or know what he was doing, if he said any thing of the kind. But he denies that any sense of that sort was meant by him; but that he only spoke ironically to the witness, who treated the plaintiff's right as so clear. I believe it in the sense sworn by the answer, and to have been mere taunting and irony; and this answer is opposed by the evidence of one witness only. To decree a redemption, when an ignorant man has been taken advantage of, without a single witness to explain or contradict a conversation set up, would lead to excessive danger. In *Perry v. Marston*, there were several witnesses examined, and their evidence proved a clear and unequivocal acknowledgment that the mortgagee had accounts ready. This is quite different, and there is nothing in the case like an acknowledgment of treating it as a mortgage within twenty years. I think therefore that the evidence opposed to the answer, and after the length of time which has elapsed, is not sufficient; and that the bill must consequently be dismissed, but without costs.

Feb. 24.

[173] His Honour, afterwards, this day, again mentioned the case, to observe that he had omitted, in giving his judgment, to state that the analogy to the statute of limitations did not hold strictly, in as much as the moral obligation remained the same, although six years had elapsed without payment of a debt.

GRANT *versus* MUNT.

Rolls.
Feb. 23, 1815.

THE bill stated that the plaintiff being seised in fee-simple of a mansion house and premises, entered into an agreement with the defendant to sell the same to him at the price of 7350*l*. An agreement in writing of the 25th June, 1812, was accordingly drawn up and signed by the plaintiff and defendant. The bill prayed a specific performance of the agreement.

Compensation for the dry rot in house and premises, decreed upon representation of the vendor to the purchaser as to the state of repairs; he relying upon such representations, and stating to the plaintiff that he did not employ a surveyor for that reason.

The defendant by his answer admitted the agreement; but stated, that previous to, and at the time he signed the same, he had been induced so to do from the statements and representations by Mrs. Grant, the plaintiff's wife, with whom the defendant had principally negotiated respecting the said house and premises, and from several letters which were written from the plaintiff and his wife to the defendant on the subject, that the same were in such a state as to require no repairs whatever, and at the time of the defendant's signing the agreement, the said Mrs. Grant was present, and declared, that "all that would be required to be laid out in repairs of the said house and premises was about 5*l*. for mending a cellar door." Shortly after the defendant took possession, finding that the roof required considerable repairs, and that a floor gave way making an opening to a cellar below, he employed Mr. Soane, a surveyor, to look over the house, who upon a careful and minute inspection and survey thereof, declared that the said house and appurtenant buildings were affected with the dry rot, and in such a state of decay as would require a very considerable sum of money to be laid out upon it in necessary repairs. The defendant claimed an

[174]

Grant
v.
Hunt.

adequate compensation out of the consideration money agreed to be paid, for the necessary and requisite repairs.

By the evidence of Dwyer, the plaintiff's gardner, it was stated, that on the 4th or 5th June, 1812, the defendant came to view and examine the premises, that the plaintiff's wife was present, and that the defendant looking at the walls and ceiling of the kitchen said, that the same wanted a little repair and whitewashing, that he viewed other parts of the said mansion house and premises, and that he appeared to be well satisfied with the same. Ranken, the solicitor for the plaintiff, another witness, stated, that before the said agreement had been signed, but after the same had been read aloud, Tyndale, the defendant's solicitor, inquired whether the said mansion house had the dry rot, and whether it was in perfect repair; that the witness objected to such questions, and the plaintiff then said, that with regard to repair, people were very apt to differ; for his part, soon after he bought the house he laid out many hundred pounds in repairing it, and being an old house, some repairs might, and probably would be necessary; that with respect to dry rot he could not tell whether there was dry rot or not; that there was some decayed wood in the vestibule leading to or at the foot of the cellar door, which the plaintiff had pointed out to the defendant; but whether it was dry rot, or what it was, the plaintiff could not tell, and added, that the defendant had seen the premises. The witness then stated, that after some farther conversation in which no guarantee was sought for or required, by or on the part of the plaintiff or defendant, as to the state of repair or dry rot, they both signed the agreement.

[175]

Grant
v.
Hunt.

By the evidence, on the part of the defendant, of Tyndale and Malton, it was stated, that at the time of signing the agreement, the defendant told the plaintiff that he relied so much upon him, that he had not had the mansion house and buildings surveyed, and that the plaintiff stated that they were in good repair except as to the cellar door, and the parts adjoining the same, which would require the sum of 5*l.* or thereabouts to repair. Crosby, another witness, stated, that it would require from five to seven hundred pounds in carpenter's work to repair the said mansion house. Soane proved, that upon going to survey the premises after the agreement, he found the timbers in several parts of the mansion house rotten, that some wainscoting had been taken down, and also the skirting in the school room; that he thought it would cost between three and four hundred pounds to repair the premises. Smart, another witness farther stated, that in the beginning of the year 1811, he had been consulted by the plaintiff about doing some repairs in consequence of the dry rot being therein, and upon that occasion the plaintiff went with the witness into the cellars, when they examined the timbers there, which supported the parlour floor and staircase floor, and which appeared to be much decayed by the dry rot, insomuch that the flooring of the said parlor and staircase was nearly eaten through thereby, and after coming out of the cellars a conversation took place between the plaintiff and his wife and the witness, respecting the best means to be used for stopping the progress of the said disorder, and for making good the damage or injury the said floors had then already sustained by it, and the plaintiff suggested a removal of all the timbers and turning arches with brick, and laying stone thereon, in such parts of the said cellaring as were not then arched,

[176]

Grant
v.
Munt.

with a view to stop the progress of the said disorder, the plaintiff observing, that if those parts were relaid with wood the dry rot would again destroy the same, and the plaintiff then inquired of the witness, what would be the expense of a stone pavement for the purpose aforesaid, and he made an estimate of the probable expense thereof, which was between 40*l.* and 50*l.*

Mr. *Leach*, and Mr. *Phillimore*, for the plaintiff, argued, that before the agreement the defendant was personally shown every part of the house, and was well able to form an opinion for himself; that the evidence did not establish either an industrious concealment of the state of the premises, or any warranty on the part of the plaintiff.

Sir *Samuel Romilly* and Mr. *Wrottesley* for the defendant, insisted, that this was a case of misrepresentation on the part of the plaintiff, amounting to fraud; that he had denied that the dry rot was in the premises, when it was fully proved that he knew of it. *Oldfield v. Round*,^(a) *Shirly v. Stratton*,^(b) *Young v. Clarke*^(c) and *Dyer v. Hargrave*,^(d) were referred to. The manuscript case cited by Mr. Sugden in his book,^(e) though of dry rot, does not apply; where a purchaser brought an action against a vendor to recover damages for having sold him a house knowing it to have the dry rot; but the vendor not being aware of the defect the purchaser was non-suited, Lord Kenyon saying there was no *mala fides* in the case.

[177]

(a) 5 *Ves.* 509.

(b) 1 *Bro. C. C.* 440.

(c) *Pre. Ch.* 538.

(d) 10 *Ves.* 505.

(e) *Sug. Law of Vendors and Purchasers*, p. 136.

Mr. *Leach*, in reply.

Grant
v.
Munt.

It is impossible to say that it was the intention of the plaintiff to enter into a warranty. Nothing appears in the case but mere matter of opinion as to what repairs were necessary.

The *Master of the Rolls* thought it was impossible to say that it was mere matter of opinion as to repairs in this case. As to warranty if the defect was patent or obvious, the warranty would not bind. I do not, however, collect from Soane's evidence that the state of the premises was perfectly visible to every body. Tyndale's evidence is very material, from which it appears that the defendant stated to the plaintiff, before he signed the agreement, that he relied so much on the plaintiff that he had not had the premises surveyed. Down to the time of signing the agreement it does not appear that the defendant had received any representation from the plaintiff as to the state of the premises. But taking Tyndale's evidence to be true, it was then made, and the plaintiff is bound to make good what he then represented, as to the state of the premises. It is impossible, therefore, to say that the weight of evidence in this case, (and something too must be allowed for the defendant's answer,) is not against the plaintiff. I think, therefore, he is bound to make compensation for his representations to the defendant, unless he will take an issue at law as to the fact of those representations.(1)

(1) Upon the subject of compensation for deficiencies in an estate sold, or outgoings from it, not known at the purchase, see *Howland v. Norris*, 1 Cox's Ca. 59. and note.

In *Shirly v. Stratton*, cited in the principal case, the bill for per-

Gower
v.
Eyre.

The plaintiff declined an issue, it was referred to the Master to see whether he could make a good title to the premises, and if he could, then to inquire what compensation the defendant was entitled to.

[178]

Before the
Vice Chan-
cellor.
Feb. 10, 11, 24,
1815.

BLAKE *versus* LUXTON.

Quasi ten-
ant in tail of a
freehold lease
for lives, may,
by surrender-
ing the old
lease, without
the trustees
joining, and
taking a new
lease to him-
self, bar the
remainders
over; not-
withstanding
there were
prior existing
trusts at the
time of such
surrender. S.
C. 3 P. Wms.
p. 10. in note.
6 T. Rep. 290.

ROBERT BLAKE, the father of the plaintiff, being seized of a freehold lease for lives, held of the bishop of Bath and Wells, and granted by indenture, dated the 5th June, 1751, to him and his heirs, for the lives of himself the said Robert Blake, his eldest son Robert Blake, and John Credland, made his will, dated the 4th February, 1752, in the presence of three witnesses, and thereby devised to Fraunceis and Credland, and the survivor, and the heirs and executors of such survivor, the said lands and premises, and all his estate and interest therein, subject to a mortgage thereon of 930*l.*, which he had borrowed to pay his sister's portion, and to purchase two of the lives of the said lease, upon trust that the said Fraunceis and Credland, and the survivor of them, should receive the rents and profits of the same and pay out of the same unto his wife Elizabeth, the

formance was dismissed, there being an industrious concealment of an outgoing of 50*l. per ann.* to keep a wall in repair; the clear rental being 90*l. per annum.*

It is stated in Mr. Belt's note to that case, from Lord Redesdale's MSS. that the Court of Exchequer refused to confirm the contract in *Shirley v. Davis*. Lord Eldon in *Drewe v. Hanson*, 6 Ves. 678. was under the impression that it had been enforced.

See farther upon the general subject, *Halsey v. Grant*, 13 Ves. 73. Sugden's Law of Vendors, 243. *et seq.*

Blake
v.
Luxton.

sum of 40*l.* per annum, during her life ; and the farther sum of 20*l.* per annum, making 60*l.* in case his son Robert should die without issue, and to allow his son Robert for his education and maintenance, till he attained twenty-one, as much as his trustees should think fit, and when he came of age, then his trustees were to be seized of the said premises to the use of his said son Robert, and the heirs male of his body lawfully begotten ; and the said testator declared his intention and will to be, that if his wife should happen to be with child, at the time of his death, that such child should, if his said son should die without issue, inherit all the said lands and hereditaments, and with the like limitations with which his son Robert was to inherit by that his will, and he did thereby give such child with which his wife should be *ensient* at the time of his death 500*l.*, to be paid when such child should attain the age of twenty-one, and also 20*l.* per annum for the maintenance and education, which sum of 500*l.*, and also 20*l.* per annum, his trustees were to raise out of his estates, by sale, mortgage, lease, or otherwise. The testator afterwards made a codicil without any date, and thereby reciting that his son John was not born at the time of making his will, he thereby ordered his trustees to raise the sum of 600*l.* out of the said estates, to be paid at twenty-one, and the farther sum of 20*l.* for his maintenance and education in the mean time ; and he declared his will to be, that in case his son Robert died without issue of his body lawfully begotten, that then his son John should inherit all his real and personal estate, in the same manner that his brother was to inherit.

[179]

The testator died, leaving Elizabeth his widow, Robert Blake his eldest son, and the plaintiff John, his only

Blake
v.
Luxton.

other son, and upon Robert's coming of age he entered into the possession of the said estate, and some time afterwards, but the same being during the plaintiff's minority, Robert Blake cancelled the said lease by tearing off the seal, and thereupon the Bishop of Bath and Wells, on the 6th June, 1770, and without the knowledge of the said trustees or either of them, granted a new lease of the said lands and premises comprised in the said former lease, to him the said Robert Blake and his heirs, for the lives of him the said Robert Blake, of the plaintiff John Blake, and John Credland, and the survivor of them.

Robert Blake afterwards died without issue, having first made his will, by which he gave the said property to the defendants.

[180] The present bill was filed by John Blake the younger son, praying that the renewed lease might be declared to enure to the uses and trusts of the former lease, and to belong to the plaintiff, and the heirs of his body under his father's will.

The defendants, by their answer, submitted, that Robert Blake had an absolute estate and interest in the premises ; and they farther stated, that after the death of Robert Blake, the plaintiff, in 1784, filed his bill in the Court of Exchequer, against the defendant Frances Luxton, then Frances Blake, widow, claiming to be entitled by virtue of the said remainder in tail to him and the heirs of his body to the said premises, and that the plaintiff might have the benefit of the said renewed lease, and that the said cause was heard before the barons of the

Exchequer, on the 13th July, 1786, when the court decreed that the plaintiff's bill should be dismissed, which decree of dismissal is now in full force, and the defendants insisted thereon in bar of the plaintiff's claim by his present bill.

Blake
v.
Luxton.

Mr. Courtenay, (in the absence of Sir *Samuel Romilly*, who was with him,) was heard alone for the plaintiff.

The legal estate in this case being in the trustees, the surrender and acceptance of the new lease by Robert Blake the son, who was *quasi* tenant in tail of this freehold lease, would not bar the claims of those in remainder under his father's will ; nor would his own will have that effect. There is no case short of alienation by such a tenant in tail which has been held to have that operation. This case is also distinguished from all others by the circumstance of their being previous existing trusts at the period of the surrender ; the trust for raising and paying the maintenance and provision for the younger son, and for payment of the widow's annuity, was then vested in the trustees who never joined in the surrender. *Barnard v. Large*, (a) *Carteret v. Carteret*, (b) *Saltern v. Saltern*, (c) *Campbell v. Sandys*, (d) were the principal authorities referred to.

[181]

Mr. *Leach*, and Mr. *Cook*, for some of the defendants ; and Mr. *Hart*, Mr. *Roupell*, and Mr. *Shadwell*, for the rest of the defendants.

(a) *Amb.* 774.

(b) 2 *P. W.* 132.

(c) 2 *Atk.* 376.

(d) 2 *Sch. & Lef.* 281.

Blake
v.
Luxton.

other son, and upon Robert's coming of age he entered into the possession of the said estate, and some time afterwards, but the same being during the plaintiff's minority, Robert Blake cancelled the said lease by tearing off the seal, and thereupon the Bishop of Bath and Wells, on the 6th June, 1770, and without the knowledge of the said trustees or either of them, granted a new lease of the said lands and premises comprised in the said former lease, to him the said Robert Blake and his heirs, for the lives of him the said Robert Blake, of the plaintiff John Blake, and John Credland, and the survivor of them.

Robert Blake afterwards died without issue, having first made his will, by which he gave the said property to the defendants.

[180] The present bill was filed by John Blake the younger son, praying that the renewed lease might be declared to enure to the uses and trusts of the former lease, and to belong to the plaintiff, and the heirs of his body under his father's will.

The defendants, by their answer, submitted, that Robert Blake had an absolute estate and interest in the premises ; and they farther stated, that after the death of Robert Blake, the plaintiff, in 1784, filed his bill in the Court of Exchequer, against the defendant Frances Luxton, then Frances Blake, widow, claiming to be entitled by virtue of the said remainder in tail to him and the heirs of his body to the said premises, and that the plaintiff might have the benefit of the said renewed lease, and that the said cause was heard before the barons of the

Blake
v.
Luxton.

Exchequer, on the 13th July, 1786, when the court decreed that the plaintiff's bill should be dismissed, which decree of dismissal is now in full force, and the defendants insisted thereon in bar of the plaintiff's claim by his present bill.

Mr. Courtenay, (in the absence of Sir *Samuel Romilly*, who was with him,) was heard alone for the plaintiff.

The legal estate in this case being in the trustees, the surrender and acceptance of the new lease by Robert Blake the son, who was *quasi* tenant in tail of this freehold lease, would not bar the claims of those in remainder under his father's will ; nor would his own will have that effect. There is no case short of alienation by such a tenant in tail which has been held to have that operation. This case is also distinguished from all others by the circumstance of their being previous existing trusts at the period of the surrender ; the trust for raising and paying the maintenance and provision for the younger son, and for payment of the widow's annuity, was then vested in the trustees who never joined in the surrender. *Barnard v. Large*, (a) *Carteret v. Carteret*, (b) *Saltern v. Saltern*, (c) *Campbell v. Sandys*, (d) were the principal authorities referred to.

[181]

Mr. *Leach*, and Mr. *Cook*, for some of the defendants ; and Mr. *Hart*, Mr. *Roupell*, and Mr. *Shadwell*, for the rest of the defendants.

(a) *Amb.* 774.

(b) 2 *P. W.* 132.

(c) 2 *Atk.* 378.

(d) 2 *Sch. & Lef.* 281.

Blake
v.
Luxton.

The prior decree in this very cause is a complete bar. The argument, however, is in effect that the new lease is void, and yet the bill prays that the defendants may be declared trustees of that lease. The old lease is gone by effluxion of time, and the plaintiff must affirm the new lease, or he can have no interest or claim. Upon the pleadings the court cannot say there was no surrender of the old lease, cancelling a lease being a complete surrender if made by the persons entitled to the lease. The court in this case will presume the concurrence of the trustees, and therefore an effectual surrender, because there have been forty-five years possession under an instrument which could not have been effectual without the concurrence of the trustees. But suppose, for argument sake, that the trustees did not concur, still a person having an equitable interest as *quasi* tenant in tail, may defeat a remainder by any disposition of that equitable estate. It could not be a breach of trust to extend the lease which would have the effect of giving the widow who was a *cestui que trust*, a better security for her annuity. The trustees, therefore, might have been compelled to join. An equitable tenant in tail may bar without a legal recovery. The new lease destroyed Robert Blake's equitable interest in the estate, and this being an act *inter vivos*, would be sufficient to bar the remainder. In Doe, on the demise of *Blake v. Luxton*, (a) Lord Kenyon even thought that a will would operate as a bar, (b) which notion could only have arisen from a conviction that a tenant in tail had the absolute dominion. *North v. Champernoona* (c) decides that tenant in tail in equity could alone bar remainders over.

[182]

(a) 6 Term. Rep. 289.

(b) 6 Term Rep. 293.

(c) 2 Ch. Ca. 63. 78.

Sir Samuel Romilly in reply.

Blake
v.
Luxton.

I presume it will not be necessary to argue that a will cannot bar the limitations over, notwithstanding the hasty *dictum* of Lord Kenyon, which has been referred to. The question in this case is, whether the surrender, and taking the new lease are sufficient for that purpose? The trustees might be presumed to have joined if it could have been without a breach of trust; but a Court of Equity will never presume it, if, as in this case, it must have been a breach of trust. There must therefore be an actual surrender proved, the legal estate being in the trustees, and they having trusts remaining to perform when the surrender is stated to have been made. But if there was any surrender, the new lease would be subject to the former trusts, *Mansell v. Mansell*,^(d) *Moody v. Walters*,^(b) and the case of *Ld. Lansdown v. March*, cited there. Trustees are not guilty of a breach of trust according as the object of the recovery suffered is to continue or enlarge, or to destroy the estate. There could be no danger of a perpetuity in this case, because all the trusts were to be performed during lives in being. I admit the trustees might have been compelled to join in renewing the lease for the benefit of the *cestui que trusts*, but then it must have been by taking a new lease upon all the same trusts. If not, something should be done to confine the effect of taking the new lease, which has not been done. In every case cited, some act has been done, some conveyance made, showing an intention to acquire an absolute interest. The case in the Exchequer is to this point only, that a tenant in tail of a freehold lease may by surrender bar

[183]

(a) 2 P. W. 678.

(b) 16 Ves. 283.

Blake
v
Luxton.

the remainders over where there are no other trusts appearing; but this case now presents to the court the fact of there being other existing trusts at the time of the surrender, the distinction arising upon which has in no case been considered. The decree in the exchequer should have been pleaded, if meant to be insisted on as a bar; it cannot be so set up by the answer, and besides which it ought to have been distinctly proved.

Feb. 24th. This day the *Vice Chancellor* delivered his judgment, in which, after stating the case very fully, he observed, that upon calling for the codicil of Robert Blake, he found that the word "leaving," before the word "issue," was not in the original codicil, though stated upon the pleadings, the words only being "without issue," and which therefore put an end to a question which had been agitated at the hearing with respect to some leaseholds for years which the testator had died possessed of, the absolute interest in the same clearly vesting in Robert Blake the son. With respect to the freeholds for lives, it was also clear that a recovery stated in the answer to have been suffered by Robert Blake, must also be put out of the question, as not having any operation to bar the plaintiff's remainder, inasmuch as freeholds for lives were not within the statute *de donis*, and not even a descendible freehold, the heir taking as special occupant only. Robert Blake, the son, was therefore, under the will of his father, not tenant in tail of the freehold lease in question; but as he had been properly called, he was only *quasi* tenant in tail of them, with remainder to the plaintiff in the event of Robert Blake's dying without issue. Robert Blake, the son, did die without issue, and the plaintiff's claim thereupon accrued, and which

Blake
v.
Luxton.

was so long ago as the year 1782. Soon afterwards, that is to say, in 1784, we find him asserting his right by filing a bill in the Court of Exchequer, in which the very point now in issue in the present cause was also then put in issue in that suit. It was not proved in that cause that any surrender in writing of the old lease was made by Robert Blake, the son; but the same rested on the fact of cancellation, by his tearing off the seal, as it appears in the present cause. Nor did the plaintiff upon that occasion want the most able counsel to assert his right which the profession could afford, it appearing that Mr. Maddox and the present Lord Chancellor then sustained his case; the counsel for the defendant being Mr. Burton and the present Lord Redesdale. The judgment of the court was delivered in the absence of then Lord Chief Baron, by Mr. Baron Eyre, one of the ablest judges that ever adorned the bench, and the plaintiff's bill was dismissed without costs. The plaintiff after that, namely, 1795, brought his ejectment, and a special case being reserved for the opinion of the Court of King's Bench, the same was fully argued upon the effect of the surrender of Robert Blake, in defeating the remainders over, upon which Lord Kenyon, and the other judges of that court decided against him. Lord Kenyon was even inclined to think, that remainders after such an estate could be barred by will. From the history given of the present case in the Exchequer by Lord Redesdale in *Campbell v. Sandys*,^(a) it appears that no such idea was however entertained either by the Court of Exchequer, or by any of the counsel concerned, as that the will would have operated to bar the plaintiff. The case referred to by Lord Kenyon, of

[185]

(a). *Ante*, p. 181

Blake
v.
Luxton.

Grey v. Mannock, did not so decide, and it is a curious fact, that Lord Kenyon, though young in the profession when he took the note, in mentioning Lord Northington's opinion, which he threw out in *Grey v. Mannock*, should have added a quære to that, thereby showing that the judgment of his early life upon the point, was better than his subsequent one. I notice this merely to dispose of the point that the will could not bar, and the late case of *Dillon v. Dillon*,^(a) is an authority to the same effect.

Notwithstanding the above proceedings, the present bill having been filed in 1812, it becomes necessary for this court to consider whether it will set aside the former decree, made between the same parties, and upon the same point. With respect to the old lease, it expired in 1797, all the lives named in it being then gone. The renewed lease is now claimed by the plaintiff. I must observe that it could be no breach of trust in the trustees in renewing a lease instead of letting it expire, supposing that they had so renewed it, or at least concurred in it. The additional disadvantage then of the old lease being expired, must be added to the objections made to the present bill, that the same point was before determined between the same parties. With respect, however, to the general power of a *quasi* tenant in tail to bar remainders over by deed during his life, that is laid down as a clear principle in Mr. Fearne's book^(b) and for which he refers to various authorities, as the

[186] *Duke of Grafton v. Hanmer*.^(c) That a surrender

(a) *Ball & Beatty's Rep.* 95.

(c) 3 *P. W.* 266. in the note.

(b) *Fearne's Cont. Rem.*
409. edit. Butler.

Blake
v.
Luxton.

will also be sufficient for that purpose was held in the case of *Baker v. Bayley*.^(a) It is quite clear then, that if there had been no antecedent trusts by the said Robert Blake, that he might have barred the remainder to the plaintiff. The question then is, whether there being existing trusts prior to the estate tail in Robert Blake, can prevent his so doing? But the same answer may be given now as has been given before to that objection, which is, that the remainder-man has no equity to call upon the party making the surrender, and to say that it was made for the benefit of him the remainder-man. If the surrender has had the effect of making a valid disposition of the lease, the remainder is gone; if not, let the remainder-man apply to a court of law. That the circumstance of a prior charge not being satisfied will not prevent a tenant in tail from barring remainders over was the very point decided in the case of *Basket v. Peirce*,^(b) and several other cases. It is also well known that the point was very much agitated by conveyances in the Marquis of Bath's case, when the opinions of the late Mr. Maddox, the present *Lord Chancellor*, and Mr. Fearne, which are now all in print,^(c) were all unanimous that an equitable recovery suffered by the owner of the first vested estate tail was valid. Mr. Fearne there refers to the cases of *Wallis v. Crimes*^(d) and *North v. Champernoon*,^(e) *Basket v. Peirce*^(f) *Bale v. Coleman*,^(g) and *Barnardiston v. Carter*^(h) before the lords in 1717, all of which are authorities to the point, that the remainder may be barred notwith-

[187]

(a) 2 Vern. 225.

(b) 1 Vern. 226. 2 Vern/r. 346.

(c) 2 Collect. Jurid. 214 to 225.

(d) 1 Cases in Chan. 89.

(e) Ib. 63. 78.

(f) Ante,

(g) 1 P. W. 145. and 2 Eq.

(h) 2 Bro. Parl. Cases, 1.

Cas. Abr. 309.

Blake
v.
Luxton.

standing the existence of prior trusts. But those trusts are not disturbed at all. So in this case the surrender could only defeat the remainder without the least affecting the prior charges. With respect to Robert Blake's intention to defeat such remainder, which it has been argued did not appear, I answer, that having taken an estate to himself and his heirs, it shows that he intended to put an end to the estate as it before existed with the remainder. The new lease speaks for itself, and shows the intent as well as the power. In every point of view, therefore, even if the case were open, I am of opinion that Robert Blake has barred the remainder to the plaintiff, and his bill must be dismissed; but adverting to the circumstance of the former suit, instituted by him in the Exchequer, I think it must be dismissed with costs.

Feb. 21, 23, 25,
1815.

FRASER *versus* LLOYD.

After verdict in an action in the petty bag, an application to discharge the defendant for not having been charged in execution within two terms, must be made to the Kings Bench; but the court to remove any difficulty made a collateral order.

FRASER, one of the sixty clerks, brought an action in the Petty Bag against Lloyd, on a promissory note for 300*l*. Lloyd put in bail. The cause went to issue, the record was delivered into the King's Bench, and a verdict was found there for the plaintiff, and judgment entered up. The defendant then surrendered himself to the Fleet Prison in discharge of his bail; but not having been charged in execution in time, he now moved before the *Lord Chancellor* to be discharged.

[188]

Mr. *Heald*, in support of the motion.

Mr. *Rose* opposed the motion, upon the ground that this court had no jurisdiction, the record having been

sent to the King's Bench, from which it was never remanded, and therefore the application ought to have been to that court. *Jefferson v. Dawson(a)* was referred to.

Fraser
v.
Lloyd.

Mr. *Heald*, in reply, contended, that the defendant having been committed to the Fleet prison by an order of this court, that this court must have the power to discharge him, and that the Fleet prison was the prison of this court, over which the King's Bench had no jurisdiction, and could not therefore discharge him out of it.

The motion stood over, in order that the *Lord Chancellor* might confer with some of the common law judges upon the subject.

This day the *Lord Chancellor* said, that he had conferred with Lord Chief Baron *Thompson* upon the subject, who was conversant with the practice, both of the common law and equity, and that he thought that there must be an order of the Court of King's Bench.

Feb. 25.

The *Lord Chancellor*, however, added, that in order to remove any difficulty he would make a collateral order of the same date.

This day Mr. *Heald* again mentioned the case to the court, stating, that Mr. Justice Bailey, upon an application made to him at Chambers, had made an order of the Court of King's Bench for the defendant to be discharged, intimating an opinion that this was a case of

[189]

(a) 1 *Saund. Rep.* 22.

Fraser
v.
Lloyd. concurrent jurisdiction. Some difficulty, however, had arisen in drawing up the concurrent order of this court.

The *Lord Chancellor* directed the register to draw up the order.

Rolls.
March 3, 6,
1815.

BARRON *versus* MARTIN.

Redemption refused though account delivered within twenty years, it being so delivered without any authority, by a receiver and manager of the estate, and the employer being in a state which rendered him incapable of managing his affairs.

[190]

By deeds of lease and release, dated the 1st and 2d of August, 1745, Joseph Sharpe mortgaged a freehold estate in Wicken, together with copyhold premises in Claveringbury, to John Martin and his heirs, to secure 1250*l.* with interest. The mortgagee took possession soon afterwards, and died in March, 1767, leaving John Martin, his eldest son and heir at law, who, as such took possession of the said freehold estate, and James Martin, his youngest son and customary heir of the said copyhold, who procured himself to be admitted tenant of the same. The mortgagee soon after his taking possession, appointed William Law receiver and manager of the said premises; and he dying in 1778, John Claridge was appointed by the said John and James Martin to that office. By a letter from Law to the widow of Sharpe, dated 6th March, 1774, he informed her, that at the desire of Martin, he had made out her account, and expressed Martin's desire that she should pay off the mortgage. After Claridge's appointment, John Martin, in various conversations with Claridge, stated to him that his title was imperfect, and about 1783 or 1784, desired him to apply to the solicitor of the mortgagor to see if any thing could be done by pecuniary means to perfect his title. Claridge accordingly about that time

offered the mortgagors some compliment or remuneration to join with John Martin in perfecting the title; but which offer was not acceded to. In 1792 or 1793, Claridge, at the desire of the mortgagors, delivered an account or statement to them of the rents and profits; but, as he himself admitted upon his cross-examination, it was without any direction or authority from John Martin so to do, he being then, and having been for some time before, of unsound and disordered mind, and incapable of managing his own affairs. An account had been kept in a distinct book of rents and profits of the said premises received, and of the mortgage money and interest down to Michaelmas 1772, with the balance struck, whereby 2546*l*. 4*s*. appeared to be then due upon the said mortgage; and the rest of the said book, which was kept by Claridge after his appointment, consisted of annual accounts of the rents received by him from the said estates, and the disbursements made by him from Michaelmas 1774, to Michaelmas 1794.

Barron
v.
Martin.

The bill was filed the 15th October, 1800, by the co-heirs of Sharp, praying a redemption.

The case was argued by Mr. *Leach* and Mr. *Huddleston*, for the plaintiffs; and by Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Treslove*, for the defendants.

The *Master of the Rolls* took time to consider, and [191] this day gave judgment to the following effect.

It is now decided, that twenty years possession by a mortgagee will *prima facie* bar a right of redemption; and it lies on the mortgagor to show, that such length of

March 6.

Barron
v.
Martin.

possession ought not to produce that effect. Here there has been a possession of about sixty years in the mortgagee. It is not, however, material to consider the effect of any thing done above twenty years before the filing of the bill, as what passed in 1772 or 1774. The question is, whether any thing has taken place within twenty years before October, 1806, when the bill was filed, to give a right to redeem. The circumstances that are relied upon are, 1st. The application by Claridge about perfecting the title; and, 2dly. The application made by the mortgagors to Claridge about delivering the accounts. As to the first, the way that transaction is stated in the bill, is, that some time after Claridge had been appointed the receiver, he was directed by Martin to make out the accounts due upon the mortgage, and of the rents received, and to propose to the plaintiffs either to pay off the mortgage or to sell the equity of redemption; and that in pursuance of such directions, he did within the last twenty years, as plaintiffs believe, call at the house of one of the plaintiffs, and there stated that Martin had ordered him to make out the accounts, and if it did not suit the parties to pay off the mortgage, the Martins would give something handsome to the mortgagors if they would make a title, meaning thereby that the Martins would purchase the equity of redemption. It is unnecessary to consider what effect such a transaction would have had if it had actually happened within twenty years, the fact being that it took place in 1783 or 1784, and therefore upwards of twenty years before the filing of the bill. But it is argued, that some of the conversations in which John Martin stated to Claridge that his title was imperfect, were within twenty years. In the first place, the *onus* lies on the mortgagor to show that fact in order to defeat the effect of the possession; se-

[192]

Barron
v.
Martin.

condly, even if we could proceed upon inference, the presumption is that the conversations were preliminary to the application, for otherwise they must have been without motive or object. But lastly, I think the conversations were quite insufficient to prevent the possession of the mortgagee from operating to bar the right of redemption, without saying that parol evidence should be altogether excluded in these cases. As to that subject I agree with the *Master of the Rolls*, in *Whiting v. White*,^(a) and with the *Vice Chancellor*, in *Reeks v. Postlethwaite*,^(b) that it should at least be clear and unequivocal. In the present case the parol evidence is not so strong as it was in either of those two cases. Then as to the other circumstance, of the application to Claridge, and of the account delivered by him, that certainly took place within twenty years. If that account had been delivered by the mortgagee himself, supposing him competent, it would certainly have been sufficient, according to the principles of this court, to entitle the plaintiffs to redeem. But Claridge was only receiver and manager of the estates, and could not by delivering such an account bind his employer who had given him no authority so to act. It was not even argued as constructively the act of the mortgagee, but only as amounting to evidence that the mortgagee kept mortgage accounts. But I think that in this case the evidence does not afford any inference that accounts were kept within twenty years. It would have been easy for any body who knew what the debt had been, to make out such an account as Claridge did. I

[193]

(a) *Ante*, p. 1.(1)

(b) *Ante*, p. 161.

(1) Also reported 2 Cox's Ca. 290. and more fully.

Barron
v.
Martin.

take it from the answer, that down to the year 1772, something like a mortgage account had been kept; but after *Claridge's* appointment the account seems only to have been kept as between a receiver and a land-owner, with this sole difference, that it was kept in a distinct book by itself. That circumstance is not sufficient to give a right of redemption. The bill, therefore, must be dismissed, but without costs.(1)

*Before the
Vice Chan-
cellor.
March 11, 13,
1815.*

STANHOPE *versus* PILKINGTON.

Equity cannot compel a resort to commissioners appointed under an act of parliament to settle disputes between parties arising from a navigation: a lease for years having expired, and the landlord proceeding to recover possession.

By an act passed in the 10th and 11th *Will. 3.* for making the rivers Aire and Calder navigable, commissioners were empowered by means of a jury to assess such damages and recompenses as they should adjudge fit to be awarded to the owners and occupiers of such lands or tenements, wears or mills, as should be used or damnified in the making such rivers navigable. In 1705 the goit or dam of Wakefield mills was made use of in carrying the said navigation to that town. By the 14th *Geo. 3.* which was a farther act for the above purpose, the said commissioners and their successors are empowered to determine what satisfaction, either by rent or sum in gross, persons should have in respect of loss or damage done to their estates and premises by the said

(1) In *Vernon v. Bethell*, 2 Eden's Ca. 110. a redemption was decreed upon evidence of letters and parol proof, showing that the party treated himself as mortgagee.

The rule as to allowing a redemption upon the ground of accounts being kept as mortgagee is recognized in *Edsell v. Buchanan*, 2 Ves. Jun. 84.

navigation. On the 7th June, 1797, Sir Thomas Pilkington, demised the said Wakefield mills to the plaintiffs for fifteen years, at a rent of 40*l*. The said lease having expired, the defendants, who were trustees under the will of Sir Thomas Pilkington, in June, 1814, gave a notice to the plaintiffs to quit, and afterwards brought an ejectment to recover possession of the said demised premises.

Stanhope
v.
Pilkington.

[194].

The bill, which was filed the 13th February, 1815, prayed that the dispute respecting the said mills might be directed to be heard and determined by the commissioners appointed by the said acts, and for an injunction in the mean time to restrain the defendants from proceeding in the said ejectment.

The defendants demurred generally.

The *Vice Chancellor* this day gave his judgment. He was of opinion, that neither by the acts which had been passed, nor by the contract which had been entered into between the parties, a court of equity could interfere to give the relief prayed. No obstacle was stated as impeding the commissioners themselves from acting. The Agreement for a lease for fifteen years having expired the legal rights of the parties returned to them. There was nothing expressed or implied to be done between them after the expiration of that time. Any injury arising from the interruption of the navigation, considering it in the light of a public road, was the subject for a new contract between the parties. A court of equity could not supply the want of it. In contracts between landlord and tenant, a court of equity cannot, upon the

March 13.

Stanhope
v.
Pilkington.

[195]

ground of benefit of the tenant, restrain the landlord at the expiration of the lease from exercising his legal right. Each party is left the same as if no contract had been made. The plaintiffs in this case should have applied before their term expired, in order to have a fresh agreement entered into. Instead of so doing, the plaintiffs lie by. Equity cannot then stop the defendants who have been diligent, in favour of the plaintiffs who have been guilty of *laches*. It cannot remedy or cure that *laches*, the opposite party never having impeded or obstructed them. There was nothing under the acts, or the agreement, enabling this court to act, or to give a continuance to the contract after the fifteen years had expired. The legal rights of the parties then arose, and each must be left to deal as they think proper with those rights.

Demurrer allowed.

March 14,
1815.

MYLNE *versus* DICKINSON.

Injunction granted upon bill filed and affidavit, to restrain proceeding in an arbitration, under the circumstances.

THE plaintiff having agreed to purchase of the defendant a patent right for making iron buoys, which the defendant had represented as very profitable, but some delay taking place on the part of the plaintiff, the defendant wrote a letter to the plaintiff, stating, that he had received an order from the commissioners of the navy for a certain number of the said buoys, but did not know how to act with the said order in consequence of the delay in completing the agreement. The plaintiff thereupon paid 3000*l.* to the defendant, and an agreement in writing was entered into, whereby the points in

difference were to be referred to arbitration. The defendant afterwards wrote a letter to the commissioners of the navy, in answer to the said order, stating that he had changed his opinion as to the utility of the said invention, and had therefore disposed of the patent.

Mylne
v.
Dickinson.

[196]

The bill was filed to have the 3000*l.* returned, and that the defendant might accept a re-assignment of the patent.

Sir *Samuel Romilly* now moved upon the bill filed, verified by affidavit, and upon notice, to restrain the proceeding in the said arbitration.

Nobody appeared to oppose the motion.

The *Lord Chancellor*.

This is certainly a singular motion ; but I think there is principle enough to support it, as it goes upon the notion of the arbitration being a part execution of the agreement, which the bill strikes at the root of.

Injunction granted till answer, or farther order.

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY,

IN

EASTER TERM, 1815,

IN THE FIFTY-FIFTH YEAR OF THE REIGN OF GEORGE III.
AND THE SITTINGS BEFORE AND AFTER IT.

GOOD *versus* BLEWITT.

Apr. 12, 1815.

This was a motion to pay a sum of money into court, appearing to belong to claimants who had not yet come in under the decree made in this cause, and who were still at sea. The bill was filed on behalf of the captain and all other the unsatisfied mariners and persons entitled to share in prize money arising from a Dutch East Indiaman, which had been captured. The decree directed an inquiry as to who were the parties entitled to share the net produce arising from the capture. The Master had made his report, and which stated a schedule of persons about thirty in number who had not come in, but who appeared to be claimants.

Motion to bring into court the shares of prize money belonging to claimants abroad, who had not come in under the decree in this cause, refused. See 13 Ves 397.

Sir *Samuel Romilly* and Mr. *Wetherell*, for the motion; [196]
Mr. *Leach* and Mr. *Hall* against it.

The *Lord Chancellor*. This is like the case of a

Good
v.
Blewitt.

creditor's bill, whete others, if they choose, may come in, and thereby, to borrow an expression from the Scotch law, *sist* themselves patties to the suit. But such creditors, if they choose it, need not come in. So parties entitled in this case need not come in under the decree. Creditors not coming under a decree may afterwards file a bill for themselves. I cannot therefore see my way in complying with this motion to have paid into court the shares of claimants, who may not choose to come in and become parties to this suit

Apr. 15, 1815.

WALL *versus* ATKINSON.

Certificate
discharges at-
tachment
against an ex-
ecutor, for
non-payment
of a sum of
money.

[199]

SIR SAMUEL ROMILLY and Mr. *Cullen* moved that Ralph Longstaff, a defendant in this cause, might be discharged out of custody under an attachment for non-payment of a sum of 500*l*. By the decree of June 20, 1811, an account was directed against Longstaff as an executor of Ralph Wall the testator in the cause. By an order of March 30, 1813, Longstaff was ordered to pay the sum of 500*l*. into the bank as part of such personal estate which had come to his hands. An attachment issued previous to the month of August, 1813, for breach of the said order, upon which Longstaff was committed to prison. On August 18, 1814, a commission of bankrupt was issued against him, and on March 29, 1815, he obtained his certificate.

In support of the motion it was contended that the certificate discharged a person in custody for non-payment of a sum of money under an order of this court. A debt directed to be paid, though not a duty to be per-

formed, as the executing a deed, will support a commission of bankruptcy. *Expurte Parker*(a) was a case of privilege from arrest under an attachment and allowed. But *Baker's* case(b) is in point with the present case.

Wall
v
Atkinson.

Mr. *Bell*, in support of the order of commitment. The words of the statute are confined to persons in execution under any debt, which he contended applied only to debts for which an action might be brought. In *Baker's* case it was stated by the court that an action of debt might have been brought for the demand. The present was a mere equitable demand against an executor, and no case could be found applicable to it.

The Lord Chancellor.

As this demand might have been made the subject for a commission of bankruptcy, or might have been proved under a commission, a certificate will bar such a debt, and process to compel payment of a debt must therefore be discharged the same as the debt itself.

He was ordered to be discharged.(1)

(a) 3 Ves. 554.

(b) 2 Str. 1152.

(1) In the matter of *Williams, a Bankrupt*, 1 Sch. & Lefroy, 169. it was decided that a bankrupt going to, or returning from his examination was exempt from arrest under an attachment for not paying money into court pursuant to an order. This was under an Irish statute providing for the discharge of the bankrupt, if arrested for debt under such circumstances. In the case of — v. —, 1822, Reg. Lib., an order had been made for a purchaser to pay the deficiency appearing upon a re-sale of premises purchased by him at a former sale, under a decree of the court. He

*Apr. 15, 1815.*FAITH *versus* DUNBAR.

A receiver having been appointed, the executor being out of the jurisdiction; on administration afterwards taken out, it was referred to the Master to re-consider the appointment of receiver, regard being had to the administration granted.

THE executor being out of the jurisdiction in Scotland, a receiver was appointed in this case, under the late act of parliament. (a) Administration having been since granted to Cosby, a motion was now made on the behalf of such administrator, for an injunction to restrain the receiver from acting.

Mr. *Leach*, in support of the motion. Mr. *Horn* against it.

The *Lord Chancellor*.

If administration is granted, the executor being abroad, but who afterwards returns, the administration is thereby at an end. The statute has enabled a receiver to be appointed in the case of such absence of the executor, but it seems defective in not providing for the accounting by such receiver. In the present case I think the best thing which I can do is to refer it to the Master to re-consider the appointment of a receiver, regard being had to the circumstance of administration having been granted.

(a) *Stat. 36 Geo. 3. c. 90.*

was taken on an attachment, and allowed the limits. On a motion that he might be committed a close prisoner, it was held by the Chancellor, that it was in the nature of an execution, and the allowance of the limits was proper.

GREGORY *versus* GREGORY.

Rolls.
Apr. 18, 1815.

WILLIAM GREGORY, by will duly executed, dated February 11, 1778, devised his freehold estate in Shalden, subject to an annuity of 10*l.*, to William Gregory his son, and his freehold estates in Grewell and Upnately (subject to an annuity of 20*l.*, to William Horner and Jane his wife for their lives,) to his son James Gregory and Theophila his wife and his friends Lyon and Cross and their heirs, in trust to receive the rents and profits until the youngest child of James Gregory attained 21, and then as to the said estate in Shalden, to sell and dispose thereof, and divide the money among the then surviving children of James Gregory and the children of testator's son John Gregory deceased; and as to the estates at Grewell and Upnately, to James Gregory for life, and after his decease the same to be also sold, and the money to be equally divided amongst the said testator's said grand-children.

Bill to set aside a purchase by a trustee for himself and his children, after a lapse of eighteen years, dismissed upon the length of time only. (1)

James Gregory as acting trustee entered into the possession of the said estates, and continued so till his death in 1793. In July, 1793, shortly before his death, James Gregory purchased of the three children of John Gregory, who were then all of age their shares and interest under the said will of their grand-father at the price of 250*l.* each, being 750*l.* for the whole, and by indentures of lease and release dated July 11 and 12, 1793, in consideration of 750*l.*, they conveyed their estate and

(1) Upon the subject of a purchase by a trustee, see *Rox v. Mackreth*, 2 Cox's Ca. and note, and *Davoue v. Fanning*, 2 Johns. C. R. 252.

Gregory
v.
Gregory.

[202]

interests in said testator's real estates to James Gregory for life, and after his ~~decease to the defendants~~ in fee who were James Gregory's children. James Gregory dying in December 10, 1793, the defendants took possession of the said estates.

The bill filed by two of John Gregory's children and the representative of the third, charged that the consideration for the said conveyance was grossly inadequate, that the plaintiffs were ignorant at the time of the value of their interests, that James Gregory was at the period in question dangerously ill, and died soon after, that the plaintiffs were in indigent circumstances, and that advantage was taken of them.

The prayer of the bill was that the said conveyance might be declared void and set aside.

It was proved on the part of the plaintiffs by Hankin, a surveyor, that the whole of the said estates were in 1793 worth 4800*l.*, and are now worth 6216*l.* Another witness confirmed the said valuation ; James Gregory was also proved at the date of the said transaction to have been in ill health, having swollen legs and a complaint in his chest, and that he never recovered. Several witnesses deposed to the circumstances of John Gregory's sons in July 1793, as being indigent, one being a working watch-finisher, earning ten and six-pence to twelve and six-pence per week, and another a barber and hair dresser in a state of poverty with three children, and who had since gone to sea ; and that the husband of the other plaintiff who was the third son, and is since deceased, was also in 1793 in the same trade of a barber and hair dresser, and his wife obliged to take in washing.

Mr. *Hart* and Mr. *Barber* for the plaintiffs argued, that the conveyance in question was void, being a purchase by a trustee, whose duty it was to sell the estate at the best advantage, that he had purchased it himself at a price grossly inadequate, and that the length of time was not sufficient to bar the plaintiff's right to relief in equity.

Gregory
v.
Gregory.

Sir *Samuel Romilly* and Mr. *Agar* for the defendants contended, that cestui que trusts may sell to their trustee, provided there is no fraud in the transaction, *Coles v. Trecothick*-(a) A fair price was paid in the present case, it being only for a moiety, and part of it merely reversionary; and the subsequent rise in the value of land which was the cause of the present bill afforded no ground for relief.

Mr. *Hart* in reply. A trustee, before he can himself purchase, must have denuded himself of that character. Neither will his taking the conveyance to his children protect them, *Huguenin v. Baseley* (b) The trustee in this case was never out of possession. Relief has been given in equity against transactions of this sort, after an equal lapse of time with the present, as in *Purcell v. Macnamara*, in this court, and several other cases.

The Master of the Rolls.

There are two questions in this case, 1st. Whether the plaintiffs had originally a ground for setting aside this conveyance; and, 2dly. Whether the lapse of time which has taken place is not a sufficient bar. Now I

(a) 9 Ves. 234.

(b) 14 Ves. 273. 289.

Gregory
v.
Gregory.

think that if this bill had been recently filed, the plaintiffs would have had a right to have had the sale set aside. James Gregory, the purchaser, was the acting trustee from the year 1778 to the year 1793, and must therefore have acquired a complete knowledge of the situation and value of the estates. It is true the bargain is made for the benefit of himself and his children. But the whole transaction was managed by him only. He chooses that the form of the transfer shall be to himself and his children. In principle it must be the same, whether the estates were purchased by him for himself and his children, or for himself alone ; and the danger must be as great to permit a trustee to purchase in the name of himself and his children, as in his own name. It is clear that he was not discharged at the time of his purchase from his situation of trustee. As to inadequacy of price, one listens with great reluctance to evidence upon that subject, given after a great distance of time from the date of the transaction. It is difficult for surveyors afterwards to say what was then the value of an estate. It is however pretty clearly made out, that there was inadequacy of price in this case. If therefore the purchase had been recent, I am of opinion that it ought to have been set aside. Then as to the length of time which has elapsed, I do not see any evidence of fraud or circumvention in this case. Can it then be said that there is no distance of time at which circumstances originally entitling a party to relief may be considered as waved or abandoned ? Certainly there may. It is only a rule of equity that a trustee shall not purchase. In all the cases in which length of time has not been allowed to operate against the title to relief, it has been shown that there has been a continuance of the circumstances under which the transaction first took place, as of the distress

of the parties, or of the improper influence used, or of some other circumstance. Here the parties were independent of the purchaser, or of his bounty. They had also the opportunity of objecting early to the sale. The only circumstance alleged in answer to this, is their poverty, which is proved to have been the fact at the time of the purchase. But the evidence as to that, stops at the year 1793, and does not in the least show any continuance of distress. Can it then be said that eighteen years which have since elapsed, can go for nothing? In *Bonny v. Ridgard*,^(a) a case before Lord Kenyon, he dismissed the bill merely upon the lapse of time, though he thought that it was a transaction in which if recent, the court would have granted relief. There would be no security for men's rights if it were otherwise. Upon the ground of length of time, therefore, the bill in this case must be dismissed; but it being upon that ground only, it must be dismissed without costs.

Gregory
v.
Gregory.

Ex parte BAKER.

Apr. 20, 1815.

A PETITION having been presented for a commission of lunacy against Henry Blackmore Baker who resided in Devonshire, and the court having granted the same; an application was now made on the behalf of the supposed lunatic, that the commission might be executed

Lunacy.
The residence
is the proper
place, at
which to ex-
ecute a com-
mission of lu-
nacy.

(a) A MS. case, cited by the *Master of the Rolls*, in *Hill v. Simpson*, 7 Ves. 167.(1)

(1) Reported, 1 Cox's Ca. 145., which see.

Ex parte
Baker.

in London upon the alleged ground, that the fact of lunacy could be more fairly tried there than in the country; and affidavits were made in support of that allegation.

Mr. *Leach*, Mr. *Bell* and Mr. *Heald*, in support of the application. Sir *Samuel Rommilly*, Mr. *Hart* and Mr. *Daniel*, opposed it.

The *Lord Chancellor* said, that the course had always been to execute the commission where the party resided. (1) Lord *Hardwicke* had so held; (a) and also that where the mansion-house of the family was situated, that decided what was to be considered the place of such residence for executing the commission. There might perhaps be exceptions to this rule, but they must be strongly made out in evidence by the party contending for them. In the present case he thought that the commission must be executed in *Devonshire*.

April 20. 22.
and 27, 1815.

SIDNEY *versus* MILLER.

Where a term was created, and no trusts of it declared, but the estate devised to tenants for life with remainders over, the court decided that there was no resulting trust as to the term, but that it attended the inheritance.

JOHN SHELLEY by his will properly executed, dated April 5, 1782, devised considerable real estates to trustees for the term of 99 years, without impeachment of waste, upon the trusts and confidence, nevertheless in the said will mentioned to be thereafter expressed and declared concerning the same, and from and after the

(a) *Ex parte Southcot*, 2 *Ves.* 401.

(1) S. P. *Ex parte Hall*, 7 *Ves.* 261.

Sidney
v.
Miller.

expiration or other sooner determination of said term of 99 years, the said testator gave the said estates to the use of Sir Bysshe Shelly for life, without impeachment for waste, with a limitation to other trustees and their heirs during the life of Sir Bysshe Shelley in trust to preserve contingent remainders; with remainder to the use of Sir Timothy Shelley, a defendant, for his life, without impeachment for waste, with a limitation to the said last mentioned trustees and their heirs, during his life, in trust to preserve contingent remainders, with remainder to the use of the first and other sons of Sir Timothy Shelley in tail male, with remainders over. And after thereby devising certain other estates therein mentioned, the said testator John Shelley by said will gave to the said Sir Bysshe Shelley and Sir Timothy Shelley and the person or persons in possession of all or any of the said estates thereby devised to them respectively, power to grant such leases in possession, as in the said will mentioned for any term of years, not exceeding thirty one years; and said testator by his said will bequeathed several legacies therein mentioned, and the said testator thereby gave and bequeathed unto the said Sir Bysshe Shelley, his executors and administrators, all and every the arrears of rent due at his the said testator's decease from his settled estates, as well as those devised to the said Sir Bysshe Shelley for his life; and the said testator thereby bequeathed his silver plate to the said Bysshe Shelley for his life, and directed that the same should be enjoyed by the person and persons for the time being in possession of said testator's mansion house called Field Place, and the estates thereto annexed. And said testator appointed said Sir Bysshe Shelley sole executor and residuary legatee of his said will.

Sidney
v.
Miller.

There was no declaration of the trusts as to the term for 99 years, either contained in or referred to by the will.

Sir Bysshe Shelley was also the heir at law of the testator, and upon his death he entered into the possession of the estates, and received the rents and profits thereof till his death. By his will duly executed dated November 28, 1805, he appointed the plaintiffs his residuary legatees, who filed the present bill against Sir Timothy Shelley and the surviving trustee of the term, claiming to be beneficially entitled to the said estates for the remainder of the said term of 99 years, as personal estate of Sir Bysshe Shelley.

The question came on upon a motion by the plaintiffs for a receiver.

Sir *Arthur Pigott* and Mr. *Blackburne* for the plaintiffs contended, that the term being raised by the will of John Shelley without any declaration of trust as to it, it belonged to the personal representative, and did not attend the inheritance, and they cited *Levet v. Needham*(a) and a dictum of Lord Hardwicke's in *Brown v. Jones*(b) in which his Lordship is reported to have said "it had been determined that if there is no declaration of a term in the case of voluntary settlements and wills, it is a resulting trust, but not in settlements for valuable consideration." *Emblyn v. Freeman*(c) was also referred to as decided upon the same principle.

Sir *Samuel Romilly*, Mr. *Hart*, Mr. *Bell* and Mr. *Wingfield* for the devisees and other defendants con-

(a) 2 *Vern.* 138. (b) 1 *Atk.* 191. (c) *Prec. in Chan.* 541.

Sidney
v.
Miller.

tended, that the rule could only apply where the testator had left property undisposed of, whereas here it was manifest that he had intended to dispose of his estate beneficially to his brother Sir Bysshe Shelley for life, and afterwards to his brother Sir Timothy Shelley the defendant, and had even directed his plate to be enjoyed with the estate. His intention in their favour would be completely disappointed by postponing their enjoyment till the end of 99 years. There must have been a mistake in the dictum ascribed to Lord Hardwicke. The other authorities do not apply. *Davidson v. Foley(a)* before Lord Thurlow, was in favour of the defendants.

The *Lord Chancellor* in the course of the argument observed, that if a precedent had been before the attorney in drawing the will, he would have used the words "and from and after the expiration or other determination of the said term, *and in the mean time subject thereto and to the trusts thereof, then,*" &c. That the probability was the trusts were for jointures for tenants for life in possession, longer terms being usually raised for portions of younger children. The question upon the whole will was, whether the intention was not sufficiently declared without the above technical words, from the power given of making leases, as well as from what he had said as to the plate. Lord *Hardwicke's dictum* surprised him, but he had some manuscript cases of his Lordship, and would inspect them.

At the sitting of the court this day the Lord Chancellor said he had not been able to find any thing amongst

(a) 2 Br. Ch. Cas. 203.

Sidney
v.
Müller.

his own manuscript cases, but he had been favoured by Mr. *Eden* with a manuscript note of Lord *Northington's*(a) of what Lord *Hardwicke* said in *Brown v. Jones*; and which The Lord Chancellor read to the bar; and afterwards observed that it principally differed from the report in *Atkyns* in not mentioning *wills*, as well as voluntary settlements.

Sir *Arthur Piggot* in reply. The note read does not differ substantially from *Atkyns*. He admitted that the trusts of the will may be defeated by the construction he contended for, but there was no help for it if the law was so. *Davidson v. Foley* does not apply, for there the trusts of the terms were actually declared. The words "in the mean time and subject thereto" not being in this will, the estates for life commence at the end of the term by the rules of law and equity. Whether the words were omitted by accident or intention does not signify.

(a) The Reporter has also been favoured by the same gentleman with the above note, which is as follows: "As to the term of 99 years, that is expressed to be to such uses and trusts as are after declared; and there are none declared, and the question is, who is to have this interest undisposed of.

This in the case of a voluntary disposition would result to the heir at law of the donor, but here the settlement being made for a valuable consideration, and by way of contract, the intent of the party is to be considered, which was plainly to settle this estate for the benefit of the issue of the marriage.

And as to this the assignees are in no better condition than the bankrupt, if he had been plaintiff, to have the benefit of this term. This court would not have decreed to him; for that would have been to defeat the settlement, and been contrary to the words of it. But it must attend the inheritance according to the subsequent limitations."

The Lord Chancellor.

Sidney
v.
Miller.

This is certainly an important question to be decided upon a motion ; but as the cause is to be set down in a few days, the parties will then have the opportunity of urging any thing farther. His Lordship then stated the will, and the question arising upon it, to be in effect whether the beneficial freehold interests given by the will should be disturbed on account of the trusts of the term not being specified or declared. He had looked into all the cases, and observed that he must be under the painful necessity of giving an opinion contrary to the *dictum* of Lord *Hardwicke* as reported by *Atkyns*. But at the end of the manuscript note which had been read, his Lordship appears to have said he would not defeat the settlement, or decide contrary to the words of it. By these words it appeared that his Lordship thought the intention of the parties must be considered. So I say. If the case is clear that the testator has meant that the parties under the will shall not take till the end of 99 years, it must be so. But if upon the whole of the will the testator intended that the tenants for life should take beneficially, the term of years is then subject to their estates. I think that enough is in the will to show that the tenant for life and those in remainder should enjoy the estates limited to them. My mind is satisfied that was the testator's intent, and that the proposition that the term is in the personal representative cannot be supported.

The cause this day came on for hearing, and no objection being urged, a decree was made, in which was inserted a declaration that the term of 99 years formed *April 27th.*

Sidney
v.
Miller.

no part of the personal estate of Sir Bysshe Shelley, but attended the inheritance according to the will of John Shelley.

*Before the
Vice Chan-
cellor.
April 26,
1815.*

AGAR versus THE REGENT'S CANAL COMPANY.

Upon excep-
tions taken to
an answer for
insufficiency
the master
may look to
the material-
ity of them,
and overrule
immaterial ex-
ceptions.(1)

THIS case came before the Vice-Chancellor upon exceptions taken to the Master's report upon a reference of the defendant's answer for insufficiency. Forty-nine exceptions had been taken by the plaintiff to the answer. The Master, by his report, stated that he had allowed the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 19th, 20th, 21st, 23d, 26th, 27th, 29th, 30th, 38th, and 49th exceptions; but with respect to the said 1st, 2d, 3d, 17th, 19th, 20th, 21st, 23d, 29th, 30th, and 38th exceptions he had allowed the same by reason that it appeared to him that the said defendants by their said answer had made discovery in part respecting the several points excepted to, and he therefore conceived, that according to the rules or practice of the court the defendants were bound to make a full disclosure and discovery. But he conceived the answer to be sufficient in the points excepted to by the 18th, 22d, 24th, 25th, 28th, 31st, 32d, 33d, 34th, 35th, 36th, 37th, 39th, 40th, 41st, 42d, 43d, 44th, 45th, 46th, 47th, and 48th exceptions

Both parties took exceptions to the report, as to so much of it as was against each of them respectively.

(1) See Office and Duties of Master in Chancery, 262. *et seq.*

This day the *Vice Chancellor* gave his judgment.

Agar

v

The Regent's
Canal Co.

After stating the general nature of the bill and answer, he observed that the question brought on by the exceptions to the report was reduced to two heads ; 1st. Whether if points excepted to are irrelevant and immaterial to the points in question in the cause, the master is competent to consider the materiality or not, or whether he should see only whether it is answered or not. As to this it is contended that if the defendant does not protect himself by plea or demurrer from discovery, he cannot by answer object that questions are not material, unless he has referred the bill for impertinence, which is a course that may be taken where immateriality is objected to the bill. The question whether the Master upon exceptions for insufficiency can consider materiality or immateriality, is of great importance because of daily occurrence. It is therefore of consequence that the rule should be understood, in order that the Masters may proceed accordingly. Upon the argument of this case I inquired if there was any direct authority upon this question, whether a defendant could protect himself from discovery on the ground of immateriality, and was furnished with only one case upon it, *Selby v. Selby*.^(a) Lord Commissioner *Eyre* in that case seems to have thought the practice was different in this respect between the Court of Exchequer and the Court of Chancery. I have looked into the register's book in order to see what became of the exceptions in that case ; it appears that there were six exceptions, certainly all minute, but which tended however to investigate the title ; and that all the exceptions were allowed. The party not having

(a) 4 Bro. 11.

Agar
v.
The Regent's
Canal Co.

protected himself from discovery of his pedigree by plea or demurrer was obliged to make the discovery. In *Sweet v. Younge*(a) and *Jacobs v. Goodman*,(b) and other cases, the defendant was permitted by answer to resist the discovery. But in no case the question has arisen, whether if the question was wholly immaterial, the defendant can by answer object to the discovery, the above cases being where there was a denial of title. By analogy, indeed, it may be argued that the objection should be taken advantage of by demurrer, like any other defect; and Lord Redesdale(c) gives as one head of demurrer that the discovery is not material; but the direct question upon an answer does not appear to have arisen in any of the printed cases. In the absence of authority, I considered it important to consult the Masters for information as to their usual course of practice in this respect, and I have therefore inquired of them; and they have all without one exception, stated their uniform practice to be, that if the questions are quite immaterial they disallow the exceptions, but if the discovery can in any way assist the plaintiff they allowed the exception. In addition to the authority of the gentlemen filling these offices, and who are all of great character and experience, though it is stated in Lord Redesdale's book(d) that "a plaintiff is entitled to a discovery of the matters charged in the bill, provided they are necessary to ascertain facts material to the merits of his case, and to enable him to obtain a decree;" yet I have farther thought it my duty to communicate with that learned Lord himself, who expressed to me that he had not the least doubt that the constant uniform practice of the Court of Chancery, in

(a) *Amb.* 353.

(b) 3 *Bro. C. C.* 487. note.

(c) *Treat. on Plead. in Chan.* 155., last edit. See also *Cooper's Eq. Plead.* 198.

(d) *Page* 248., last edit.

all his time, concurred with that of the Court of Exchequer, and with the opinion of the Masters. It may also not be amiss to notice the introduction to every answer, which expresses the answer to be to so much as is material for the defendants to answer. A trustee or incumbrancer interested only in part, or heir at law, always answers to so much of the bill as applies to him, and need not answer the rest of it. In the case of a bill requiring an admission of assets, or that the defendant may set out an account; if the defendant admits assets, he is not obliged to set out the account. What would be the consequence of driving every pleader to demur? It would be impossible with the greatest skill to do so: in a case like the present there must be forty-nine demurrers, or one demurrer to forty-nine questions, where if the defendant answers to any thing he overrules the demurrer; and the material and immaterial parts of a bill, if artfully constructed, are so mixed up as to make it almost impossible to separate and analyze what may be demurred to from what may not. Although therefore I have always been excessively cautious and attentive upon the subject of the practice of this court, lest I should be biassed in the long experience I had in another Court of Equity, where they are constantly deciding on immateriality against exceptions, and where such decisions from the injunction which follows are frequently of the greatest value and importance, and as to which practice there I never remember a doubt being entertained during the period of between twenty and thirty years which I practised there; yet I am clearly of opinion that the practice of the Court of Chancery in this respect is the same. No inconvenience has been known to arise from it, or it would have been corrected by appeal; and I wish

Agar
v.
The Regent's
Canal Co.

Agar
v.
The Regent's
Canal Co.

therefore as far as lies in my power to put the practice out of all doubt. Secondly, as to the application of it to this case, the Vice Chancellor was clearly of opinion that the exceptions in this case were all material, and also that the Master was correct in the rule of practice he had stated in his report, that if the party answers in part he must make a full discovery as to that, and that there was no instance of his being permitted to select such part of a question as he chooses to answer, and refuse the rest if material. (1) *Taylor v. Milner*, (a) *Dolder v. Huntingfield*, (b) and all the cases before the Lord Chancellor, state that point clearly. All the exceptions therefore taken by the plaintiff to the Master's report were ordered to be allowed, and those taken by the defendant to the report were ordered to be disallowed.

Rolls.
April 26, 27,
1815.

LUSHINTON *versus* BOLDERO.

A will devising estates for life without impeachment of waste, not revoked by a codicil directing the trustees to let until tenant for life married, such leases under restrictions, one of which was that the leases should not be unimpeachable of waste.

JOHN BOLDERO by his will duly executed, dated December 31st, 1785, devised to trustees his manors or lordships of Aspeden and Berkesden, and his capital mansion house of Aspeden Hall, with the appurtenances and all other his freehold messuages, tenements and lands, in Aspeden, and at Luffen Hall and Cromer, to have and to hold the same unto the said trustees, their executors, administrators, and assigns, for and during,

(a) 11 *Ves.* 41.

(b) *Ibid.* 283.

(1) *Prevost v. Phillips*, 4 Johns. C. R. 205. Office and Duties of Masters in Chancery, 267. *et seq.*

and unto the full end and term of one thousand years upon trust as therein mentioned ; and subject to the said term of one thousand years and the trusts thereof, he gave and devised the said manors or lordships heraditaments and premises, unto and to the use of his son Charles Boldero, and his assigns, for and during the term of his natural life, without impeachment of waste, with remainder to other trustees, and their heirs, during the life of Charles Boldero ; and after his decease, to the use of the first and other sons of the said Charles Boldero in tail male, with the remainder to Henry Lushington, during the term of his natural life, without impeachment of waste ; with remainder to the said trustee during his life ; and after his decease to the use of the first and other sons of Henry Lushington in tail male, with remainders over. The said testator, John Boldero, afterwards made a codicil to his said will, which codicil was duly executed, and dated August 22d, 1787 ; and he hereby ordered and directed his first mentioned trustees, with all convenient speed after his death, for such time, and so long as his son Charles Boldero should continue unmarried, from time to time to demise, grant, lease, and to farm let his capital messuage of Aspeden Hall aforesaid, with its offices, buildings, gardens, orchards and appurtenances thereto belonging, or therewith held and enjoyed, and his park, called Aspeden Park, and the lands which should happen to be in his own occupation at the time of his death, situate in the parish of Aspeden, with the respective appurtenances, and together with the household goods, furniture, pictures and prints, which should be in the said capital messuage or mansion-house at the time of his death, at the best and most approved yearly rent and rents, that could be reasonably had or got for the same, for any term or number of years in

Lushington
v.
Boldero.

[218]

Lushington
V.
Boldero.

possession, not exceeding the term of twelve years, if his said son Charles Boldero should so long live and continue unmarried; but as there be contained in every such demise lease or grant, a clause for determining and putting an end to all and every such demise or demises, grant or grants, lease or leases, and the term or terms of years thereby demised, immediately after the expiration of six calendar months next after the marriage of his said son Charles Boldero, and so as there also be contained in every such demise and grant or lease, a condition of re-entry for the non-payment of the rent or rents thereby to be reserved, and so as no clause be contained in any such demise, grant or lease, giving power to any lessee or lessees to commit waste, or exempting him, her, or them from punishment for committing the same, and so as the respective lessee and lessees should seal counterparts of the lease; and his will was that the rents from time to time to accrue and grow due in respect of the said hereditaments so to be demised, should, when and as the same amounted to the sum of £1000, be laid out in the names or name of the said lessors, and the survivors and survivor of them, his executors and administrators, in the purchase of 3 per cent. consolidated bank annuities, and when and as a convenient purchase of [freehold or copyhold land of inheritance could be made, that the lessors should invest the said money in the purchase of the same, and settle and convey the same to the same uses, and upon the same trusts as were declared of the lands and hereditaments comprised in the said will.

[219] Charles Boldero was at the death of the testator, and still continued unmarried, and having become a bankrupt, his assignees caused all the timber standing and

growing upon the said park and lands to be marked for the purpose of felling and cutting down the same with the intent of selling and disposing of the same, as part of the personal estate of the said Charles Boldero.

Lushington
v.
Boldero.

The bill was filed by the plaintiff as the eldest son of Sir Henry Lushington, being the first tenant in tail *in esse* of the said devised estates, charging that the said codicil was a revocation of the said will, so far as the same gave Charles Boldero an estate for life without impeachment for waste, in the said last mentioned premises; and that neither he nor his assignees could take any benefit from the said premises, save by the accumulation of the rents and profits thereof, and the investment thereof in the purchase of other estates, and praying relief accordingly, and also for an injunction against cutting timber.

Mr. *Leach* and Mr. *Bell* for the plaintiffs contended, that the codicil was as to the real estate therein mentioned an implied revocation of the will; the disposition of the rents, and restrictions as to letting and as to committing waste being inconsistent with the will giving an estate for life to Charles Boldero without impeachment of waste.

Mr. *Hart*, Mr. *Wingfield* and Mr. *Heald*, on the other hand, contended that in all cases of implied revocation the intention to revoke must be clear and certain. The restrictions in the codicil are confined to the possession of the estate only whilst Charles Boldero continued unmarried. His interest in the timber growing on the estate was not at all affected by the codicil.

Lushington
v.
Boldero.

The *Master of the Rolls* was of the same opinion, and said that a revocation of a devise contained in a will by a subsequent codicil, must be either by express words of revocation, or inconsistency of Devise. As to express words of revocation in this case, there were none. Neither from the directions given to the trustees could it be said that he intended to revoke the will. The trustees were only to let the estate until a particular event happened, without impeachment of waste. What was there in that to take the interest in the timber from Charles Boldero. It was not given to the trustees, and who was then to take it but Charles Boldero? If they should make a lease unimpeachable of waste, there would then indeed be two conflicting interests; not that they would do so, but the testator had interposed to prevent it. There was therefore nothing to revoke the gift to Charles Boldero.

[221]
April 28, 29,
1815.

AGAR *versus* THE REGENT'S CANAL COMPANY.

Defendant in contempt, and some exceptions allowed to his answer, and some overruled. If the plaintiff excepts to the Master's report as to the exceptions overruled, as well as the defendant to those which the Master has allowed; the defendant is entitled to a subpoena for a better answer, after the plain-

A MOTION was made on the part of the plaintiff in this cause for a sequestration against the defendants the company, and for a sergeant at arms against Munro the other defendant, upon their exceptions to the Master's report upon the insufficiency of their answers being disallowed. The defendants had previously undertaken that the above process should issue unless they put in their answer.

Mr. *Agar* and Mr. *Bell*, in support of the motion, argued that the answer being insufficient was no answer,

and referred to *Gregor v. Lord Arundel*,^(a) and that the defendants being in contempt, the plaintiff might proceed with process of contempt, according to the late cases of *Boehm v. De Tastet*^(b) and *Coulson v. Graham*.^(c)

Agar
v.
The Regent's
Canal Co.

plaintiff's excep-
tions have
been allowed
by the court,
and the de-
fendant's dis-
allowed.

The *Lord Chancellor*, however, thought that the circumstances of the plaintiff having also excepted to the Master's report distinguished the present case from either of those which had been cited. The defendants might have put in an answer to the exceptions allowed by the Master without arguing their exceptions to the report; but the plaintiff having also expected that the defendants should waive the benefit of so much of the report as was in their favour. They cannot with safety set about drawing the answer till the plaintiff's exceptions are disposed of. If they did put in an answer, and it afterwards appeared that the Master was right, the defendants might be chargeable with impertinence. His Lordship therefore thought that the defendants, upon the specialties of this case, were entitled to be served with a subpoena for a better answer.

[222]

NOBLE versus GARLAND.

April 27.
May 6, 8, 1815

A MOTION was made in this case, that a commission might issue for the examination of witnesses abroad. The answer had not come in. The bill merely prayed a discovery, that a commission might issue for the exam-

A commission
for the exami-
nation of wit-
nesses abroad,
may issue be-
fore answer,
where the suit
is merely for a
discovery and
commission.

(a) 8 Ves. 87.

(b) 1 Ves. & Beames, 324.

(c) *Ibid.* 331.

Noble
v.
Garland.

ination of the plaintiff's witnesses in the islands of Malta and Sicily, and at Gibraltar, and for an injunction in the mean time to restrain proceedings in an action brought by the defendants.

Sir *Samuel Romilly*, Mr. *Bell* and Mr. *Wray*, in support of the motion, contended that by the practice of this court the plaintiff was entitled to such an order before answer, although the practice of the court of Exchequer was different; and two cases in this court were mentioned in which such application had been granted: *Foderingham v. Wilson* in March, 1812, and *Yates v. Barker*, in May, 1812.(a)

(a) The Reporter has been favoured with the following note of the above two cases. *Foderingham v. Wilson*, in Chancery, March 6th, 1812. Sir *Samuel Romilly* moved for a commission to examine witnesses in the Islands of *Barbadoes* and *Madeira*. An injunction had been obtained for want of an answer. An affidavit had been made by the plaintiff of the facts of his case, and that he was advised, and believed that he had a good defence at law, but could not safely proceed to trial in the action which had been brought by the defendant without the evidence of witnesses resident at *Madeira* and *Barbadoes*. The application prayed that the injunction might be extended to restrain the defendant from proceeding to trial in the action at law, and that one or more commission or commissions might issue for the examination of witnesses at *Barbadoes* and *Madeira*. Mr. *Leach* opposed the motion, and stated an affidavit of the defendants' solicitor, setting forth an arbitration in which a sum of money had been awarded to the defendant. The Lord Chancellor ordered, that upon the plaintiff giving security for the sum awarded, and on paying it into court, the injunction should be extended to stay trial, and that the plaintiff should be at liberty to sue out one or more commission or commissions for the examination of witnesses at *Barbadoes* and *Madeira*, with liberty to defendant to join in commission, and to either party to sue out a duplicate.

Yates v. Barker, in Chancery, May 30th, 1812. Sir *Samuel Ro-*

Mr. Hart, Mr. Leach, and Mr. Wingfield, opposed the motion, because the answer might afford such discovery as to render the commission for the examination of witnesses unnecessary. The practice of the Court of Exchequer is admitted to be against such an application. *Foderingham v. Wilson*, by imposing the obligation on the plaintiff of giving security for the paying the money into court, proves the application to be not usual, and to have been granted under special circumstances.

Noble
v.
Garland.

[224]

Sir Samuel Romilly in reply.

The practice of the Court of Exchequer as to injunctions is different from this court, and the rule therefore as to issuing commissions ought to be different.

The Lord Chancellor observed, that in the case in which security was ordered, there was this particular circumstance, that the matter had been under arbitration and an award against the plaintiff signed two days after the arbitrators had authority to act; and therefore the court ordered security to be given in that case. In the two cases cited, the motion had been granted although opposed. In the exchequer in policy cases, they are of equitable relief. In those cases it may be

willy and Mr. Shadwell for the plaintiff. Mr. Wilson, for the defendant. A common injunction had been obtained for want of an answer; and it was moved upon an affidavit of the plaintiff, that he might be at liberty to issue one or more commission or commissions, for the examination of witnesses residing in the United States of America; and that the injunction might be extended to stay trial until after the return of such commission, which was ordered accordingly.

Noble
v.
Garland.

proper to wait for the answer. This is a mere bill for discovery to aid an action at law, and for a commission to examine witnesses. I avow that I have been under a mistake if this motion cannot be granted. I will however inquire into the practice.

Saturday,
May 6th.

[225] His Lordship said that his present opinion was that the motion may be granted; that the practice of this court was so, and the good sense was with the practice where the object of the suit was only a discovery and commission: and if his Lordship did not inform the plaintiff of having altered his opinion by Monday, he allowed the order to be drawn up.

The order was made.

May 6, 1815.

GOLDSMID *versus* GOLDSMID.

Where a trustee refused to consent or object to a marriage, the court referred it to the Master to consider of the propriety of the marriage.

BENJAMIN GOLDSMID by will dated August 25, 1798, gave to his brother the defendant Asher Goldsmid 5000*l.* upon trust to invest the same in the purchase of stock in the 3 per cent. bank annuities, and out of the dividends and interest thereof to pay the sum of 150*l.* per annum for the maintenance of his daughter the infant plaintiff until she should attain the age of 21 years, or be married, and that the residue of such interest and dividend should accumulate and go along with the capital, and if it should happen that his said daughter should marry under the age of 21 years, and that such marriage should be with the previous consent of his executor, then and in such case he directed the capital of the

said trust-money and the savings and accumulations thereof to be paid and transferred to his said daughter ; but in case his said daughter should marry without such previous consent as aforesaid, then he directed that such capital and accumulations should not be paid or assigned to her ; and the said testator bequeathed the said money to be settled to her separate use for life, with remainder to her issue if any, and in default of such issue, to and amongst the relations of his said daughter *ex parte paterna*.

Goldsmid
v.
Goldsmid.

[226]

The bill was filed by the infant daughter, stating that a proposal of marriage had been made to her, which was in all respects a good and suitable match, but that the defendant would not interfere either by consenting or objecting to the said marriage. The bill prayed that in case the defendant refused the said guardianship and trust in respect of the plaintiff's marriage, that the plaintiff might be entitled to her legacy absolutely, and that it might be referred to the Master to inquire whether the marriage was a suitable marriage.

The defendant by his answer declined any interference in regard to the said proposed marriage.

The cause was heard upon bill and answer.

Sir *Samuel Romilly* and Mr. *Cooke* for the plaintiff ; Mr. *Trower* for the defendant.

The *Lord Chancellor* ordered the refusal of the defendant to interfere by consenting to, or dissenting from the marriage, to be taken down by the register, and upon such refusal decreed it to be referred to one of the Mas-

Noldamid
v.
Goldsmid.

ters to inquire and state to the court whether the marriage was a proper marriage, and if he approved of the same, then to receive proposals as to a settlement to be made upon the infant plaintiff.

[227]
May 6, 1815. *Ex parte* HENDERSON.—*In the Matter of* JOHNSTONE.

Construction
of Lord Ross-
lyn's order of
the 26th June,
1793.

In a country
commission
the party is
not entitled to
28 days, and
as much more
time as may
be necessary
for the post.

THIS was a petition praying that a writ of *superse-
deas* which had issued might be quashed, and that a
writ of *procedendo* might issue directing the commis-
sioners to proceed under the said commission.

A commission of bankrupt issued on March 14, 1815.
against James Johnstone, of Liverpool. On Tuesday
the 11th April, being the 28th day after the date of the
commission, the commissioners met in Liverpool in or-
der to open the commission, and Johnstone was thereupon
found a bankrupt. On the same day the solicitor to the
commission wrote by the post to his agents in London
to insert the same in the Gazette of the Saturday fol-
lowing, being the 15th April. On Tuesday the 13th
of the said month the agents called at the bankrupt of-
fice and gave the said notice, when they were informed
that a writ of *supersedeas*, at the instance of Thomas
Harrison, had that morning issued, superseding the com-
mission so obtained and opened by the petitioners.

The affidavit of the solicitor to the commission stated,
that he did not proceed to open the said commission in
consequence of the bankrupt's having made some propo-
sals to his creditors for compromising his debts, and that
a meeting of the principal creditors had been called for

that purpose; that on Monday the 10th day of April, the bankrupt informed him the Solicitor, that he believed the whole of his creditors would come in to his proposal of compromise; but on the following morning, being Tuesday the 11th April, the bankrupt informed the deponent that he found he would not be able to effect his object, and for that reason it was concluded that the commission should be opened on the last-mentioned day.

*Ex parte
Henderson,
in the Matter
of
Johnstone.*

Mr. *Leach* and Mr. *Cooke* in support of the petition, relied on the above circumstances, and cited *ex parte Ellis(a)* as in point.

Sir *Samuel Romilly* against the petition insisted on Lord Rosslyn's order of the 26th June, 1793, as not having been fully complied with.

The *Lord Chancellor*.

There have been twenty-two years practical exposition of Lord Rosslyn's order, and I understand such practice to be, that if notice is not given at the bankrupt office within the time mentioned in the order, which is fourteen days in a town commission, and twenty eight days in a country commission, the supersedeas is of course. The rule is clear, and the only exception is in the case which has been cited: but there were particular circumstances in that case which must have fixed the attention of the court. I think there was a good deal in the fact in that case of the solicitor who applied for the second commission at the office on Monday, having been

*Exparte
Henderson,
in the Matter
of
Johnstone.*

[229]

previously informed that the party was declared a bankrupt on Saturday, though too late for the Gazette. The question of practice is reduced to this, whether a supersedeas should not issue as a matter of course if the bankrupt office has not been informed within the fourteen or twenty-eight days of the commission having been proceeded in. In the case of the country commission, I think the party is not entitled to the twenty-eight days and to as much more time as may be necessary for the post.

The petition was dismissed.

STOCKDALE *versus* BUSHBY.

*Rolls,
May 10, 1815.*

Legacy to the testator's "namesake Thomas, the second son of his brother John." John had no son of the name of Thomas, but his second son's name was William, who was held entitled.

THOMAS STOCKDALE by his will dated the 1st July, 1799, amongst other things, gave and bequeathed as follows : " I give and bequeath unto my namesake Thomas " Stockdale, the second son of my brother John Stock- " dale, over and above his equal share with his brothers, " hereafter mentioned as my brother's sons, the sum of " 1000*l.*, when he shall attain his age of 21 years." And after giving certain legacies therein mentioned unto each of the daughters of his said brother John Stockdale, the said testator thereby gave and bequeathed all the rest, residue, and remainder of his estate and effects whatsoever and wheresoever, unto the sons of his said brother John Stockdale, to be equally divided among them share and share alike, when and as they should respectively attain their respective ages of 21 years ; and the interest and dividends arising therefrom, or a sufficient part of each share thereof, to be applied for their maintenance and education, and the said testator thereby appointed the defendants Bushby and Forbes, the executors and trustees of his said will.

John Stockdale the testator's brother had not any son of the name of Thomas.

Stockdale
v.
Bushby.

The bill was filed by the plaintiff, who was the second son of the said John Stockdale, but whose name was William, claiming to be entitled to the said legacy of 1000*l*.

The defendant Bushy by his answer stated, that the testator shortly before his death gave the said defendant instructions for getting his will prepared, and thereupon declared to the said defendant that he, the testator, wished to leave to the second son, his namesake, 1000*l*. more than any of the rest of his brother's sons.

The other defendants, Jackson Stockdale and John Stockdale, who were the other sons of the testator's brother John Stockdale, submitted that the plaintiff was not entitled to the said legacy of 1000*l*., or to any preference over them.

The cause was heard upon bill and answer.

Sir *Samuel Romilly* and Mr. *Roupell* for the plaintiff contended that the plaintiff was entitled to the legacy of 1,000*l*., besides his share of the residue, as he was the second son of the testator's brother, and no other person answered any part of the description given to the legatee of the said 1,000*l*., and that he was sufficiently described by the will, although the testator had mistaken his christian name.

Mr. *Leach* and Mr. *Clason* for the defendants, the other sons of the testator's brother, contended that the testator's only motive and inducement for giving the le-

Stockdale
v.
Bushby.

legacy of 1,000*l.* was that the legatee was his namesake, not as being the second son of his brother, which failing, the legacy also did not take effect, but the plaintiff would only share equally with his brothers. *Campbell v. French*(a) was referred to as decided upon a principle applicable to the present case. Parol evidence was admissible to prove what was the testator's knowledge of facts at the time of making his will; and the defendant Bushby's answer, as not being replied to, was relied on as such evidence.

The *Master of the Rolls*, without hearing the reply, asked how he was to know that it was the testator's intention to give the legacy to his namesake only; that was indeed possible, but was it a condition?

Decree for the plaintiff.

April 21,
1815.

TARLETON *versus* BACKHOUSE.

Bonds though they necessarily carry interest, given for instalments made up of principal and interest, being the consideration of a purchase or assignment of real and personal estate, are not usurious.

By indenture dated the 13th March, 1808, between Daniel Backhouse of the first part, Edmund Thornton of the second part, and John Tarleton of the third part, reciting a partnership which had existed between Tarleton and Backhouse till about the year 1802, and that disputes had arisen between them concerning the affairs of the partnership, and that to end the same it had been agreed that Tarleton should purchase the share and interest of the said Backhouse in the partnership estate and effects, both real and personal, at the price or sum of 40,000*l.* to be paid with interest by instalments, and

(a) 3 Ves. 321.

Stockdale
v
Bushby.

that the interest at the rate of 5 per cent. per annum on the said sum should be added to the principal, and the amount of the said principal sum and interest should be paid by twelve instalments, one of which should be made at the end of every year next after the day of the date of the said indenture, and should amount to the one twelfth part of the said principal sum of 40,000*l.* and also the full interest of the said sum of 40,000*l.*, or such part thereof as should from year to year remain due and payable ; and reciting that in a computation of the interest so agreed to be paid it appeared that the same would amount to the sum of 13,000*l.*, and that in pursuance of the said agreement Tarleton had executed and delivered to Backhouse twelve bonds bearing equal date with the said indenture, one of which was conditioned for the payment of 5,333*l.* 6*s.* 8*d.* at the end of one year, another for the payment of 5,166*l.* 13*s.* 4*d.* at the end of two years, another for the payment of 5,000*l.* at the end of three years, another for the payment of 4,833*l.* 6*s.* 8*d.* at the end of four years, another for the payment of 4,666*l.* 13*s.* 4*d.* at the end of five years, another for the payment of 4,500*l.* at the end of six years, another for the payment of 4,333*l.* 6*s.* 8*d.* at the end of seven years, another for the payment of 4,166*l.* 13*s.* 4*d.* at the end of eight years, another for the payment of 4,000*l.* at the end of nine years, another for the payment of 3,833*l.* 6*s.* 8*d.* at the end of ten years, another for the payment of 3,666*l.* 13*s.* 4*d.* at the end of eleven years, and another for the payment of 3,500*l.* at the end of twelve years, it was witnessed that for the said considerations, Backhouse promised and agreed to convey to Tarleton, his heirs, executors, administrators and assigns, all Backhouse's right, title and interest in all the real and personal estates and effects, debts and property of

Tarleton every description of which Backhouse and Tarleton
v. were jointly seized or possessed, interested in or entitled
Backhouse. to.

The above bonds having been executed, and some of the instalments having become due, actions at law were commenced by Backhouse against Tarleton to recover the amount of the same. The present bill was thereupon filed by Tarleton for the purpose of rescinding the said contract, and for an injunction to restrain proceeding at law. The defendant having succeeded in dissolving the injunction which had been obtained, a motion was made by him to compel the plaintiff to pay the instalments now due into court.

Sir Author Piggott against the motion, objected that as the bonds carried interest, and the instalments secured thereby were made up both of principal and interest, that the same were for interest upon interest, and therefore usurious.

Sir *Samuel Romilly* for the motion.

Though a mortgage and the interest thereof cannot by any present contract carry interest, yet by subsequent contract it may. That however does not apply to any agreement on the sale of an estate, because a vendor may certainly sell for what sum he pleases. In fact it is the price only of the estate, which the bonds secure in the present case, and it is not a loan of money which is usurious.

[234] *The Lord Chancellor* was of opinion that as Backhouse might at the end of every year have brought an

action, and have had judgment for the principal and interest then due on the bonds ; in equity the bonds could not be affected with usury, as the same might be considered as having been called in, and the instalments paid : and he also thought that the defendant ought to pay the principal and interest due into court.

Tarleton
v.
Backhouse.

SHORE *versus* COLLETT.

May 11, 1815.

THE plaintiffs being seized and possessed of the reversion in fee of certain copyhold or customary estates and premises as devisees in trust under the will of Felix Vaughan, put up the same for sale by public auction. The printed particulars contained a general description of the said estates as follows : " The estates hereafter mentioned are nearly equal in value to freehold, being copyhold under the manner of Tottenham otherwise Tottenham, subject to a fine certain of 13s. 4d. each house, upon death or alienation, free and clear of any heriots, quit-rents or other fine than above stated. The respective purchasers will be entitled to possession and to the improved rents of the several premises described in each lot, on the termination of the ground lease which was granted the 23d March, 1716, for 111 years from Michaelmas then next, which lease contains a covenant on the part of the lessee to keep all the premises therein described, together with all other erections and buildings which might be erected and built during any part of the term thereby granted, in good and sufficient repair and condition, and so yield up the same at the expiration of the term ; with a power for the lessor to enter and give notice of any want of reparation or amendment."

The reversion of an estate having been put up to sale by auction, describing it as leased with a covenant on the part of the tenant to repair ; and the purchaser objecting to the title because no counterpart of the lease was in the possession of the vendors ; it being stated to be in the hands of a party under a partition of the estate made some [235] time before ; the court thought that such counterpart ought to be deposited for the benefit of all parties, before it could compel the purchaser to take.

Shore
v.
Collett.

The defendant Collett was the highest bidder of five of the said lots, and thereupon paid a deposit of 20*l.* per cent. on his purchase-money, and signed a memorandum in writing for the completion of his purchase.

The plaintiff afterwards filed a bill for the specific performance of the said agreement, and the usual reference was made in the said cause to inquire whether a good title could be made by the plaintiffs to the said premises.

The Master by his Report stated that the counterpart of the lease of the 23d day of March, 1716, had not been produced; but he was of opinion that there was not any sufficient objection to the said title, and that a good title could be made by the plaintiffs to the said premises. And he found that no mention was made in the said printed particulars of sale respecting the possession or custody of the counterpart of the said ground-lease. And he stated that the defendant requiring to be furnished with an attested copy of the said lease, and a covenant to produce the original counterpart, to enable him to bring [236] actions of covenant if necessary, it was an answer stated by the Solicitors of the said plaintiffs, that Mr. Moore the executors of Mr. Foyster (who was seized in fee of an undivided fourth part of the estate in question previously to a late partition thereof, and whose devisees are now entitled to the allotment made upon the said partition to the said Mr. Foyster, in respect of such fourth part) had the counterpart of the said lease which he had produced before the House of Lords, and suffered a copy to be taken, then in possession of the said Solicitors of the said plaintiffs; that the said plaintiffs could not covenant to produce the original, it not being in their possession, but that the purchasers would be

Shore
v.
Collett.

entitled to a production in the same manner as the said plaintiffs then were. That the counsel of the said defendant, being of opinion that the defendant the purchaser to be secure should have an attested copy of the said lease, with a covenant for the production of the counterpart thereof, the vendors stated that they had applied to Mr. Foster's executors, and requested them to deposit the counterpart in the hands of some banker in the names of four or five of the persons which are or may be interested in it, which they had declined to do, but agreed to enrol it in the Court of Common Pleas for safe custody. And he found that shortly afterwards the said counterpart was enrolled in the Court of Common Pleas, and under the circumstances aforesaid, it appeared to him that the said plaintiffs had not then acquired to themselves the means of assuring the said defendant the production of the counterpart of the said lease, or any sufficient evidence of the contents thereof, whenever such production might become necessary for the purpose of enforcing the covenants on the part of the lessee contained in the said lease. And therefore, although such circumstances might not be considered as raising an objection to the title of the said plaintiffs the vendors, yet he submitted to the consideration of the court whether the said defendant should be compelled to complete the said purchase, until some sufficient assurance should be made to him for the production of the said counterpart as there might be occasion.

[237]

To this report, the defendant having excepted, upon the ground that the Master ought to have reported that the objections were valid objections to the title, and that therefore a good title could not be made; the exceptions having come on to be argued before the Vice-Chancellor were overruled.

Shore
v.
Collett.

The plaintiffs afterwards moved that the defendant might pay to the plaintiffs the residue of his purchase money and the interest thereon, and might be also ordered to pay the plaintiffs their costs of this suit to be taxed.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Wetherell*, in support of the motion.

Mr. *Leach* and Mr. *Shadwell*, opposed it.

[238] The motion stood for judgment till this day, when the *Lord Chancellor* said he was of opinion that the counterpart of the lease not being in the possession of the plaintiffs, was not an objection to their title. It was in the possession of one of the parties to the partition. No doubt the parties entitled to the other shares would be entitled to the production of the counterpart of the lease, in order to enable them to proceed against the tenant if necessary. But unless the deed was deposited he would not compel the purchaser to take under one of the lessors. It would be too much to put the purchaser to the necessity of filing a bill from time to time to have the counterpart delivered to him as often as he might want it.

His Lordship also thought that what was now sought might be ordered upon motion, without putting the plaintiffs to the necessity of setting down the cause on farther directions. And it being understood and admitted that the counterpart of the lease had been since actually deposited, his Lordship granted the prayer of the motion as to the purchase money and interest.

DAVIS *versus* MAY.

Rolls.
May 12, 1815.

THIS was a bill filed by the representatives of a mortgagor against the representatives of a mortgagee, praying a redemption. The mortgage was granted in 1793, and the principal sum advanced was 700*l*. From 1793, down to 1799, the mortgagee never received any thing on account of either interest or principal; and at the latter period, the mortgage, debt, principal, and simple interest, amounted to about 1000*l*. In 1799, the mortgagee was let into the receipt of the rents. The rent which he received from that time down to 1809, considerably exceeded 35*l*. a year, the annual interest of the 700*l*.; and by application of those rents in keeping down the interest during that time annually running on the 700*l*., and in paying off the arrear of the interest which had before accrued, all interest down to 1809 was, by the beginning of that year, paid off, and the mortgage debt was, therefore, at that time, reduced to about the original sum of 700*l*. From 1809, down to June, 1813, shortly after which time the defendant's answer was filed, the mortgagee first, and after his death, the defendants, his representatives, continued in the receipt of the rents; and in each year during that time the rents they received were three or four times more than the annual interest of 700*l*. The defendants at the time of the hearing were still in possession.

Annual rests are not directed in the account against a mortgagee in possession from the middle of the time, but only from the beginning in a special case, or not at all. (1)

[239]

(1) Annual rests are either to apply an excess in extinction of principal, as in the case of mortgagee in possession, and an executor creditor, or to show the state of the account annually. See Office and Duties of Master in Chancery, 83.

Davis
v.
May.

A point was made as to the manner in which the accounts ought to be taken ; and which came on upon an application to rectify the minutes of the decrees.

Mr. *Leach* and Mr. *Lovat* for the plaintiffs, insisted, that from 1809, at which time all arrear of interest had been paid off, the annual excess of the rents beyond the annual interest, ought to be applied annually in sinking the principal, and that for that purpose the decree ought to direct the accounts from 1809 to be taken with annual rents ; and *Robinson v. Cuming*,^(a) and *Gould v. Tancred*^(b,) were cited ; and two cases from the register's book, *Forside v. Boyers*, June 20th, 1811, and *Kingston v. Roper*, Dec. 3d, 1811, were also mentioned.

[240]

Sir *Samuel Romilly* and Mr. *Bell*, for the defendants, insisted that the accounts ought not to be taken in that manner, but that the proper mode was to calculate simple interest on the 700*l.*, the original mortgage money from the date of the mortgage, and ascertain the amount of all rents received, and then deduct the total rents received from the amount of the principal mortgage money, and the interest so to be calculated on it. That an application having been made to the register, he had searched his books for three or four years past, and had found ten cases of decrees for taking the accounts of mortgagees in possession, only two out of which *Forside v. Boyers* and *Kingston v. Roper*, which had been cited on the other side, had directed annual rests to be made ; but that the other eight did not contain any such direction,^(c) from which it seemed clear that it was not the

(a) 2 *Atk.* 410.

(b) *Ibid.* 534.

(c) The names and dates of the other eight cases were as fol-

usual course of the court to direct annual rests, unless the case is extraordinary, and where the mortgagor will be materially injured without it. Thus Mr. *Croft*, the register, upon being consulted, had also stated that it was not usual to direct annual rests, except under special circumstances.

Davis
v.
May.

The *Master of the Rolls* said, he thought his recollection of the form of decrees was the same. Either decrees make annual rests throughout or not; there was no intermediate case. Here the special circumstances seemed to make the other way.

[241]

Rolls.

May 12, 1815.

MACNAMARA *versus* LORD WHITWORTH.

RICHARD WHITWORTH by his will duly executed, dated March 20th, 1808, devised and bequeathed as follows: "As I owe many debts to various persons, I am desirous, and direct, that they should be paid as soon as may be, and within a year after my decease. I give and bequeath all my estates real and personal, in the counties of Stafford and Salop, to Charles Lord Whitworth my cousin, late ambassador to the courts of Russia, France, &c. and to Edmund Plowden, now of Harton Grange, in the county of Salop, Esq. trustees to this my will, in trust to them to preserve contingent remainders, that they do first, or as soon as may be direct to be paid off all

Devise of "all my said manors, lands, tenements and effects, real and personal," to one for life, and after his decease to his issue male and the heirs male of such sons successively one after another; with remainder to A. "and in default of his issue male as before," then over to B. "and in default of his issue male as before," then to the plaintiff. A. held entitled for life, with remainder to his first and other sons

lows: *Hall v. Callidge*, April 21st, 1812. *Bennett v. Kneebone*, April 27th, 1812. *Hansard v. Hardy*, Feb. 3d, 1812. *Elisha v. Elisha*, Feb. 14th, 1812. *Baker v. Rose*, July 2d, 1811. *Maddock v. Maddock*, July 4th, 1811. *Dighton v. Earl of Macclesfield*, March 30th, 1814, and *Morgan v. Lewis*, Nov. 29th, 1811.

Macnamara
v.
Lord Whitworth.

in tail male ;
B. to take in
remainder in
the same
manner, and
that the plain-
tiff was enti-
tled to the ul-
timate re-
mainder in
fee.

my debts with any overplus of rents or sale of lands as hereafter mentioned, as they shall think proper after payment of interest due to Thomas Lloyd, Esq. I leave and bequeath all my manors, lands and tenements, and effects, real and personal estate, to my trustees to sell part of the said estates and effects as they shall think proper for the payments of my debts, or some part of them ; I then give and bequeath all my said manors, lands, tenements and effects, real and personal, to my cousin Charles Lord Whitworth, late Ambassador to the Courts of Russia and France, for his life, and after his decease to the eldest son issue male of him the said Charles Lord Whitworth lawfully begotten, the heirs male of the body of all and every such son or sons lawfully issuing, severally, successively and in remainder, one after another, as they and every of them shall be in seniority of age or priority of birth, the elder of such son and sons and the heirs male of his and their body and bodies lawfully issuing ; and for the default of such issue, then to Lord Aylmer, an officer in the army, and in default of his issue male as before, then to Philip Pauncefort, Son of the late George Pauncefort my cousin by the female line ; and in default of his issue male as before, then to Edmund Plowden, Esq. late or now of Halton for his life only, and after his decease, then to John Macnamara, the second son of John Macnamara, Esq. of Langoed Castle, South Wales.

[242]

The bill was filed by the said John Macnamara claiming an estate in fee simple in remainder, after estates for life to Lord Whitworth, Lord Aylmer, and Philip Pauncefort, and their first and other sons in tail male, and the estate for life to Edmund Plowden.

The bill prayed that the will of the testator might be established, and that his debts might be paid out of his personal estate, or else by sale of a sufficient part of his real estate, and that the rights of the several parties interested under the said will might be ascertained and settled; and that the trustees might be directed to execute a conveyance of the said estates according to such rights.

Mcnamara
v.
Lord Whit-
worth.

The defendant Lord Whitworth by his answer claimed to be entitled under the said will to an estate tail in possession. The defendants, Lord Aylmer and Philip Pauncefort, also claimed estates tail in remainder.

Sir Samuel Romilly for the plaintiff.

Mr. Leach and Mr. Shadwell for Lord Whitworth, Mr. Bell for Lord Aylmer, and Mr. Richards for Philip Pauncefort. [243]

For the plaintiff it was contended that Lord Whitworth took an estate for life, with remainder to trustees, to preserve contingent remainders, with remainder to his first and other sons in tail male, with remainder to Lord Aylmer for life, remainder to the same trustees, to preserve contingent remainders to his first and other sons in tail male, with remainder in the same manner to Philip Pauncefort, in strict settlement, with remainder to Edmund Plowden for life, with the ultimate remainder to the plaintiff in fee. The words after the limitation to Lord Aylmer "in default of such issue male as before," must be taken to mean in default of his having sons, or of such sons having issue male, and the same interpretation must be put on the words "in default of such issue male

Macnamara as before," which follow the limitation of Philip Paunce-
Lord v. Whit- fort. Though there are no words of inheritance in the
worth. devise to the plaintiff, yet the devise of all the testator's
 real and personal estates to his trustees, authorizing them
 to sell any part, and subject thereto his devising "all his
 said manors, messuages, lands, tenements and effects,
 real and personal," to the several persons therein named
 for estates for life, or estates tail, till he comes to the
 plaintiff, whose estate he does not describe, but leaves it
 upon the words just mentioned; those words are suffi-
 cient ground to create in him an estate in fee simple by
 implication.

[244] For the defendants, it was contended, that the words
 "as before," could not have the effect of devising the
 estate by implication in strict settlement to Lord Aylmer
 and Mr. Pauncefort. That the words "in default of
 issue male," gave them estates tail in succession. There
 were also not sufficient words upon the will to give more
 than an estate for life to the plaintiff.

The *Master of the Rolls* was of opinion, that the plain
 words of reference used by the testator, necessarily in-
 troduced the same limitations as were contained in the
 prior part of his will. That Lord Whitworth therefore
 having the estate first devised to him for life, with re-
 mainder to his first and other sons in tail, that Lord
 Aylmer and Mr. Pauncefort also took in the same man-
 ner. He also thought that the plaintiff was entitled to
 the ultimate remainder in fee; for although the word
 "effects" would not alone be sufficient, yet the testator
 in this case had used other words sufficient to carry the
 inheritance, as "all his said manors, lands, tenements
 and effects, real and personal."

MARTINIUS *versus* HELMUTH and SCHMIDT.

Jan. 24, 26,
1815.

MR. HEALD moved, on the part of the defendant Helmuth, to dissolve the injunction which had been granted in this cause, to restrain the said defendant from proceeding in an action at law to recover the policy of insurance effected by the plaintiffs on a cargo of wheat per the ship *Hoffnung*, in the pleadings named.

Interpleader allowed by a factor against both defendants residing abroad, and one not appearing. The subject, a policy on a cargo lost, for effecting which the plaintiffs claimed to be reimbursed their expenses.

The plaintiffs had various dealings in trade with Ludwig Arendt of Wismar, who had frequently consigned wheat to them as his factors. Arendt, on the 15th August, 1814, wrote from Wismar to the plaintiffs, informing them of a shipment of wheat which he destined for them. Arendt also afterwards wrote another letter to the plaintiffs, as follows: "22d August, 1814.—I confirm my last of the 15th instant, and inform you that you will have to expect from Messrs. J. F. Muller & Co. of Königsberg, a cargo of wheat, of 60 to 65 lasts, for my account, and probably a similar from Elbing, of which you may soon expect the bill of lading, according to my last. I intended consigning you a cargo from hence; but on farther reflection, I have declined it, as the quality is but middling, and would not fetch a good price in your market. This parcel goes to Liverpool." Instead of receiving the proposed consignment from Muller & Co., the plaintiffs received from the defendant Helmuth, at Königsberg, a letter, as follows: "9th September, 1814.—Commissioned by Mr. Arendt of Wismar, I am about completing a cargo of wheat, in order to send the same to you, in which you will then have the goodness to effect the insurance for said friend, as I hear that the pre-

[246]

Martinus "miums are upon the rise. I wish you would rather
Helmuth and "before-hand cover about 60 to 65 lasts, value about
Schmidt. "1,800*l.*, leaving the name of the ship and master to be

"filled up hereafter; for it will be a week before the bill
"of lading can be sent." Helmuth afterwards wrote to
the plaintiffs, the following letter: "20th September,
"1814.—Already on the 9th instant I advised you of
"a shipment for account of Mr. Arendt, requesting you
"to effect insurance. This shipment would have taken
"place sooner if I could have met with a proper vessel,
"and had not been detained by the high demands of
"freight; but at last I have completed 45 lasts per
"Hoffnung, Schmidt. I enclose the bill of lading. The
"remaining 20 lasts will be shipped in the course of this
"week. On the other hand, I take the liberty to draw
"upon you for £1,000, which please to protect for ac-
"count of Mr. Arendt; otherwise refer the drafts to
"Messrs. Bernoulli, and then deliver them the bill of
"lading. Captain Schmidt will sail out from Pillau this
"very day. I wait your reply." In pursuance of the said
directions, the plaintiffs effected the insurance required
to the amount of 1,800*l.* for which is due to them the
sum of 129*l.* for premiums and charges, and they placed
the same to the debit of Arendt. They afterwards
wrote to Arendt and also to Helmuth, informing each
of them of what they had done, and mentioning that
they had declined the accepting the drafts, not having
heard from Arendt. Helmuth, in an answer dated the
20th October, directed the plaintiffs to deliver the car-
goes to Bernoulli, as having accepted his drafts. In
consequence of this the plaintiffs delivered the bill of la-
ding to Bernoulli, but retained the policy in their hands.
[247] Shortly after they had so done, they received a letter
apprising them of Arendt's insolvency, and desiring

the plaintiffs to keep the cargo of wheat for the benefit of his estate. The ship and cargo were afterwards totally lost at sea.

Martinus
v
Helmuth and
Schmidt.

The bill was filed in consequence of the adverse claims of Helmuth and Charles Frederick Schmidt, the assignee of the estate and effects of Arendt to the policy of insurance which the plaintiffs still retained in their hands ; and prayed that they might interplead, and the right to the said policy be ascertained ; and for an injunction to restrain their suing the plaintiffs at law, offering however to deliver up the said policy to either of the defendants who was entitled thereto, upon being repaid the £129 advanced by the plaintiffs in effecting the same.

Schmidt had not appeared, and was resident abroad.

It was argued that the letter from Helmuth, on which the policy had been effected, having advised the plaintiffs that bills would be drawn on them for the invoice amount of the cargo, was notice to them that the property would not pass to Arendt unless those bills were accepted ; and consequently that the insurance was effected to cover the property of Helmuth only. The plaintiffs having refused to accept the bills on which condition only they were to have the bills of lading, must be considered as holding the policy for the benefit of the party *bona fide* interested in the cargo. It was probable that Schmidt would never appear to the process of the court, and the injunction therefore would have the effect of keeping Helmuth out of his property for ever.

Mr. Owen opposed the motion as premature, and contended that the cause must be brought to a hearing, or [248]

Martinus
 ▼
 Helmuth and
 Schmidt.

at least that the court would wait till the answer of the other defendant Schmidt was put in, who as assignee of Arendt appeared to have a strong claim. If Helmuth obtained the money the plaintiffs might hereafter be sued by Arendt or his assignee for it.

The *Lord Chancellor* said that he had already given his opinion in *Stevenson v. Anderson*(a) that a bill of interpleader would lie, although one of the parties who claimed the property was out of the jurisdiction, and might never come within it ; and observed that he would enjoin for ever afterwards a person who would not appear. His Lordship was of opinion that in the present case the injunction should be continued, and that the plaintiffs should bring the policy into court to be deposited with the master ; that the defendant Helmuth should be at liberty to bring actions and recover money due on the policy, and pay the same when recovered into court ; and that the plaintiffs should be ordered to get in the answer of the defendant Schmidt with all due diligence ; and in default of their doing so, that the defendant Helmuth should be at liberty to apply for the money recovered.(1)

The order was made accordingly.

(a) 2 *Ves. & Beams*, 407.

(1) In the case cited the Lord Chancellor said, that bills of interpleader where one defendant was not within the jurisdiction had been sustained for a reasonable time ; and the plaintiff having used due diligence to procure appearance, obtained relief by in-

function [p. 410.] That the plaintiff is bound to bring all the persons within the jurisdiction in a reasonable time ; if he does not, the only person within the jurisdiction must have the subject of competition, and the plaintiff must be indemnified against those out of the jurisdiction, when they think proper to come within it, and sue either at law or in this court. Ibid. 411.

Martinus

v.

Helmuth and
Schmidt.



C A S E S

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY,

IN TRINITY TERM, 1815,(a)

IN THE FIFTY-FIFTH YEAR OF THE REIGN OF GEORGE III.

AND THE SITTINGS BEFORE AND AFTER IT.

PIETERS *versus* THOMPSON.

Mr. ROUPLE moved to take a certain parchment writing off the file, which had been filed as an answer for irregularity. The objection was to the title, which was "The joint and several answer of Joseph Thomson the elder and Joseph Thompson the younger, defendants, Siedes Pieters and German Pieters complainants:" there being an omission of the words "to the bill of complaint of." The motion was made upon affidavit, the six clerk having declined to give any certificate, as he considered that it would have been taking upon him-

*Before the
Vice Chan-
cellor.
Sitting for the
Lord Chan-
cellor.
May 30, 1815.*

*Answer ta-
ken off the file,
when the title
omitted the
words "to the
bill of com-
plaint of."*

[250]

(a) The *Lord Chancellor* was unable to sit during the whole of this term, being confined with the gout ; but returned to court at the first seal after term.

VOL. I.

Pieters
v.
Thompson.

self to decide the question. *Griffiths v. Wood(a,)* was referred to, where an answer misnaming the plaintiff was considered as no answer, and ordered to be taken off the file, by the description of a paper writing purporting to be an answer.

Mr. *Hayes* opposed the motion upon the ground that as it clearly appeared by the title of the present answer who were the plaintiffs and who were the defendants in the cause, it was quite sufficient.

The *Vice Chancellor* ordered it to be taken off the file.(b)

Before the
*Vice Chan-
cellor, sitting
for the Lord
Chancellor.
June 1, 1815.*

PLATAMONE versus STAPLE.

Injunction
granted to re-
strain the de-
fendant from
suing for a
rent charge
granted, to
qualify him to
sit in parlia-
ment, the pur-
pose never
having been
answered.

THE bill in this case stated, that John Johnstone deceased, in his lifetime, being in habits of intimacy with the defendant, made and executed a conveyance or assignment to him, dated Oct. 3d, 1812, whereby, for a nominal consideration of ten shillings, but which in truth never was paid, Johnstone granted to the defendant, during his natural life, an annuity or rent charge of 340*l.* charged upon lands and hereditaments belonging to Johnstone. The bill charged that the said conveyance was made to the defendant to answer some purpose of his own, but was never made use of, or applied to such purpose; and that the defendant was therefore bound to reconvey the same, as having been voluntary and without any consideration, and for an occasion for

[251]

(a.) 11 *Ves.* 62.

(b) *Ex relatione.*

Platamone
v.
Staple.

which it was not used. Johnstone was dead, having devised and bequeathed his real and personal estate to his sister who had married plaintiff Platamone. The bill prayed a reconveyance of the said annuity or rent-charge of 340*L.*, or for the defendant to deliver up or cancel the deed, and for an injunction to restrain him from proceeding under it by action, distress, or otherwise.

The defendant by his answer stated, that in September, 1812, being about to become a candidate for some borough at the general election, and not having a sufficient estate in lands to qualify him to sit in parliament, he wrote to Johnstone and informed him of his purpose, and stated that a qualification would be necessary for him, and that Johnstone in answer thereto made and executed the deed of Oct. 3d, 1812, in the bill mentioned. The defendant farther stated, that it was not afterwards necessary for him so to use it, but he believed that Johnstone executed the deed, not only to give defendant a qualification to sit in parliament, but also with an intention to secure, in part, the performance of a property which Johnstone had previously made, to provide for the defendant.

Sir *Samuel Romilly* and Mr. *Roupel* moved upon the answer, for the injunction prayed by the bill, and relied upon the above circumstances.

Mr. *Horne* and Mr. *Cross* opposed the motion, and contended that the deed in question having been given in fraud of the statute of Anne,^(a) which was passed to secure the independence of parliament, though it was

[252]

(a) *Stat. 9 Anne, c. 5.*

Platamone
v.
Staple.

never used for the purpose intended, yet being made and executed against a fundamental law of parliament and public policy, there was no equity for the grantor or his representatives to have it afterwards delivered up ; and they relied upon the case mentioned by Lord *Eldon* in *Curtis v. Perry*, (a) of a bill filed to have a reconveyance of a qualification given by the plaintiff to his son to enable him to sit in parliament ; the purpose being answered ; as having been very properly dismissed by Lord *Kenyon* with costs. The defendant also swears to a promise of Johnson to provide for him, and that in expectation of it, he did not enforce the deed.

Sir *Samuel Romilly* in reply.

The case cited does not apply, the present defendant not having made use of it for the purpose intended. If the purpose had been answered, there are several other cases beside the one mentioned, against the right to a re-conveyance. As to the defendant's expectation of being provided for by *Johnstone*, as being the reason for his not setting up the deed sooner, the case of *Alsager v. Romley* (b) determined that where a party did not set up a demand in expectation of a bounty by will, "that being the case of a solicitor who did not call for payment of a debt from some ladies) having been disappointed in that expectation, he could not afterwards set it up.

[253]

The VICE-CHANCELLOR thought that this was not a case of the nature referred to by Lord *Eldon* in *Curtis v. Perry*, the defendant never having become a candidate for a seat in parliament. In that event, therefore, it was to be restored, the purpose not being answered. There was no ground therefore against the plaintiff's

(a) 6 Ves. 747. (b) Reported 6 Ves. 748. upon another point.

equity upon the statute as a fraud upon the law, or as being against public policy. As to the farther intention of gift by *Johnstone* to the defendant, it was only in the nature of conjecture by the defendant. The circumstances also did not quadrate with the supposition. The amount of the rent-charge looked only like a purpose of giving a qualification, and any farther intention not being evidenced in writing, showing the nature, extent, or terms of such provision; and the defendant never having called for the annuity till lately, there was sufficient doubt to make it proper to grant the injunction till the hearing of the cause.

Platamone
v.
Staple.

The injunction was accordingly granted, but the defendant was ordered to pay the arrears of the annuity into court. (1.)

¶ (1) In *Roberts v. Roberts*, 1 Daniels' Reports, 143. it was held by the Court of Exchequer, that a party who had conveyed an estate as a qualification to kill game, could not in equity compel a reconveyance, although the instrument had never been made use of. It was a fraud on the law, and the plaintiffs could have no right to get the estate back. The Lord Chief Baron noticed the distinction of the Vice Chancellor in the principal case, that the deed had not been acted upon, and stated he could not see it. That the Vice Chancellor had taken it only upon an interlocutory order.

The opinion of the Court of Exchequer, was recognized by the King's Bench.

In ——— v. ———, 2 Jac. & Walker, 391., a conveyance to give the grantee a qualification to kill game remained in custody of the grantor, without being made use of. The grantee obtained possession of it under improper representations, and claimed the estate. Held that the court would not assist either party. See also, *Ibid.* 565.

Rolls.
May, 30,
June 6, 1815.

DUNCAN *versus* DUNCAN.

Where husband and wife lived separate by mutual consent, and no evidence of any cruelty on the part of the husband, and he had before marriage settled part of her property upon her: the court refused to decree maintenance.

FRANCIS BURROWS by his will, after giving to his loving wife Elizabeth the sum of 30*l.* to put herself and all his children in mourning, proceeded as follows :

“ *Item*, I give and bequeath unto John Sumner and Robert Stevenson, their executors and administrators, the sum of 400*l.* 4 per cent. bank annuities, and all sums of money I shall hereafter lay out in the public funds, upon trust, in the first place, to permit and suffer my said wife Elizabeth to receive, take and enjoy the interest and dividends thereof, for and towards the maintenace of herself and all my children, as well those I had by my two former wives, as those I have or may have by my said present wife, until their respective ages of 21 years ; and from and immediately after the death of my said wife Elizabeth, then upon this farther trust, that my said trustees do and shall transfer such stock unto and amongst all my said children as shall be living at the death of my said wife at their respective ages of 21 years.

“ *Item*, I give, devise and bequeath unto the said trustees and their heirs, all those my freehold messuages or tenements with the appurtenances situate in upper Shadwell, upon trust in the first place to permit and suffer my said wife to receive and take the rents and profits thereof for her natural life for and towards the maintenance of herself and all my children ; and I do declare my mind and will to be, that in case my said wife shall marry again, that then the interest of the said stock and produce of my said estate shall not be paid to my said wife any longer, but that the same shall be applied by

my executors and trustees for the maintenance and education of such children as shall not have attained their respective ages of 21 years. All the residue and remainder of my estate and effects, I give, devise and bequeath unto my said loving wife, her executors, administrators and assigns for ever." The sum of 500*l.* 4 per cent annuities was left by the testator standing in his name at his decease.

Duncan
v.
Duncan.

The testator's widow, after his decease, intermarried with the defendant Duncan; but afterwards separated from him, and they lived apart by mutual consent. The present bill was filed by her, by her next friend, against her said husband, charging that the separation was on account of the cruelty of her husband, and seeking that he might be compelled to make a settlement to her separate use of the property left by the testator, and praying a receiver of the real estate.

The defendant by his answer denied that the separation was on account of cruelty, and stated that upon his marriage with the plaintiff, a settlement was executed, whereby 3000*l.*, part of the property to which the plaintiff was entitled in her own right, was settled upon her; but that the defendant had not made any provision for her out of his own property.

No evidence was entered into by the plaintiff or defendant as to the cause of their separation.

Sir *Samuel Romilly* and Mr. *Perry*, for the plaintiff, contended that she was entitled under the circumstances to have the property in question secured to her. The settlement already executed by the defendant constituted

Duncan
v.
Duncan.

no objection, being only of part of the wife's fortune with nothing of his own. No case had determined that to be sufficient to make him a purchaser of the remainder of her property. Here she was entitled to a chose in action, being stock standing in the name of trustees. *Wright v. Morley*(a) and *Nicholls v. Danvers*(b) were referred to.

Mr. *Hart* and Mr. *Raithby*, for the defendant, argued that there was no case where the husband had made any settlement before marriage, in which the court had ever interfered on the behalf of the wife against the husband.

The Master of the Rolls.

If it were necessary to put a construction upon this will, I should be of opinion that the bequest to the wife was revoked in the body of the will, and not restored by the residuary clause. I think, however, that this bill cannot be sustained, being in fact a bill for separate maintenance. The facts are, that the husband and wife do not live together; the cause of the separation does not appear. No provision for her is made by him in addition to the settlement. Now, I do not find any instance in which upon such a state of facts, the court has ever decreed separate maintenance to the wife, either out of the husband's property or out of the property of the wife. The cases in which the court has interfered are where the husband has been guilty of cruelty, turned the wife out of doors, or quitted the kingdom without making any
[257] provision for her. But where the case goes no farther than that they merely live separate and apart, I can find

(a) 11 Ves. 12.

(b) 2 Vern. 671

no authority for decreeing separate maintenance to her, still less for making any addition to what has been already settled on her.

Duncan
v.
Duncan.

Bill dismissed.(1)

HORNE *versus* BARTON.

Rolls.
May 30,
June 6, 1815.

THOMAS WOODROUFFE SMITH by his will properly executed, devised real estates to trustees and their heirs, upon trust for the use and benefit of all and every his children who should live to attain the age of 21 years or be married, which should first happen, in equal shares or proportions undivided, for and during their respective lives, with remainder to their issue severally and respectively in tail general, with cross remainders over; and he directed his trustees to make and execute a settlement of his said real estates accordingly.

A testator having devised his real estates, to be settled on his two daughters in equal proportions, undivided for their lives: with remainder to their issue severally and respectively in tail general, with cross-remainders over: the court thought that the settlement should contain not only cross-remainders as between the children of the two daughters, but also as between the two families.

It having been referred to the Master to settle the said real estates according to the will, between the testator's two daughters Anne Barton and Maria Woodrouffe Smith; the Master by his report stated that in settling the draft of the said deed he had inserted therein cross-remainders not only as between the several children of the said Anne Barton and the said Maria Woodrouffe respectively, but also as between the two families of the said Anne Barton and the said Maria

[258]

(1) That the court will decree maintenance where the husband has gone abroad, and left no provision for her, see *Sleech v. Thorington*, 2 Ves. 560. and *Bullock v. Menzies*, 4 Ves. jun. 798.

Horne
v.
Barton.

Woodrouffe, which he conceived to be according to the true intent and meaning of the said testator's will.

Exceptions having been taken to the said report, for that the Master ought not to have inserted in the said deed cross-remainders between the two families, in the same manner as between the issue of the said daughters :

Mr. *Rouple* and Mr. *I. L. Williams*, in support of the exception, contended, that according to the will the master was not warranted in inserting cross-remainders as between the families, but that the fee of each moiety of the estate in default of issue should be limited to each of the daughters, or that a general power of appointment thereof should be limited either by deed or will.

Mr. *Hart* and Mr. *Raithby* for the report, contended that the cross-remainders could not be confined to the issue, the testator having directed the estate to be undivided. The words of the will were comprehensive enough to embrace cross-remainders as to the whole estate.

Mr. *Rouple* in reply.

The testator has gone no farther than to direct the limitation of estates tail. As to the term undivided used by the testator, its operation was only during the life estates of the daughters.

The *Master of the Rolls* was of opinion that the Master had put the right construction upon the will. The testator had expressly directed cross-remainders after the

limitation of the estate to the daughters and their issue severally and respectively in tail general. The exceptions therefore were over-ruled.

Horne
v.
Barton.

WILKINSON *versus* WILKINSON.

Rolls.
June 6, 1815.

UPON exceptions to the Master's report, the question was, whether the defendant John Henry Wilkinson had, by becoming bankrupt, charged and incumbered the life-estate and provision by the testator's will, made to and for him during his life, so as not to be entitled to the personal receipt, use, and enjoyment thereof. The Master had reported that he was of opinion that the defendant Wilkinson, by becoming bankrupt, was not entitled.

Bankruptcy held not a forfeiture under a clause in a will against alienation.

The testator, Joshua Wilkinson, by his will, dated the 30th April, 1790, gave an annuity of 500*l.* to his wife, and also gave annuities of 50*l.* a year, to each of his daughters, and the remaining rents and profits of his leasehold premises to his son John Henry Wilkinson, and also a provision to his other son, William Wilkinson; and then followed this clause: "Provided always, and I do hereby declare, that the annuity of 500*l.* before given to my said dear wife for her life, and the provision I have made for my said daughters, Sarah Pearson and Elizabeth Cowdale, for their respective use, during their respective lives as aforesaid, and the estates given to my said sons for their lives, is and are upon this express condition, that in case they, my said wife, sons, and daughters, shall respectively assign or dispose of, or otherwise charge or incumber the life estates, the annuities and

Wilkinson
v.
Wilkinson.

provisions so made, to and for them during their respective lives as aforesaid, so as not to be entitled to the personal receipt, use, and enjoyment thereof, then and from thenceforth, the annuity or life-estate, or interest of him, her, or their heirs respectively so doing, or attempting so to do, shall from thenceforth cease, determine, and be void, to all intents and purposes whatsoever, and shall immediately thereupon descend to, and devolve upon, the person or persons who shall be next entitled thereto by virtue of the limitation aforesaid, in such manner as the same would have been done, in case he, she, or they was or were then respectively actually dead, any thing herein contained to the contrary notwithstanding.

Mr. Johnson, in support of the exception, argued, that the mere fact of the bankruptcy of the defendant was not in the contemplation of the Court, as a fact to be sent to the Master; but even if it were, still the Master was wrong in his conclusion. These cases are always construed strictly according to the words of the limitation. This case was not to be distinguished from the cases upon leases, in which there is contained a clause restraining alienation, and upon which clause it has been determined that the taking the lease in execution is no forfeiture. Doe, dem. *Mitchinsen, v. Carter.*(a)

[261] Sir Samuel Romilly and Mr. Horne, for the defendant Wilkinson; Sir Arthur Piggott, Mr. Hart, and Mr. Bell, for other defendants, relied upon *Dommett v. Bedford*,(b) as in point. *Shee v. Hale*,(c) was also mentioned as a case in which a condition against alienation was held broken by taking the benefit of an insolvent act.

(a) 8 Term Rep. 57.

(b) 6 Term Rep. 684.

(c) 11 Ves. 404.

The Master of the Rolls.

Wilkinson
v.
Wilkinson.

The question in this case is, whether the testator has expressed an intention of taking away the life estate which he had given to his son, upon the bankruptcy of that son. Now courts of law have held that an assignment by operation of law, which bankruptcy is, is not an alienation within the meaning of a restraint against alienation. If so, the testator's son, in this case, has not alienated, so as to forfeit his estate under the will. As to the testator having intended a personal enjoyment by his son only of this property; he probably did so; but he has not expressed himself in such a manner upon that subject, as that I am prepared to say his interest ceased by what has taken place. I shall think a little of it, and if I change my opinion shall intimate so.

CONST *versus* EBERS.

[262]
Before the
Vice Chan-
cancellor.
June 7, 1815.

Mr. JOHNSON moved to commit the defendant for putting in a fourth insufficient answer. The application was founded upon Lord *Clarendon's* order,(a) by which a defendant may be committed, upon a fourth answer being certified insufficient. *Clotworthy v. Melish*(b) appears to have been the last case arising upon

Motion to commit upon a fourth insufficient answer refused, the plaintiff not having a report of the insufficiency of such fourth answer; though the defendant had filed a fifth answer.(1)

(a) See *Beames' Orders of the Court of Chancery*, p. 183.

(b) 2 Ch. Cas. 279.

(1) The rule of the English Court of Chancery is, for the defendant to pay 40s. upon a first answer reported insufficient, three pounds for a second, four pounds for a third, five pounds for a

Const
v.
Ebers.

the order, in which, though a plea was held not to be an answer within the meaning of the rule, yet the practice itself was recognized. Here the plaintiff had not a report to the fourth answer being insufficient, but the defendant having put in a fifth answer, was an admission from him of the insufficiency of the fourth answer, so as to render any report of it unnecessary.

Sir *Samuel Romilly* and Mr. *J. Martin* opposed the motion upon an affidavit that the fifth answer had been accepted. Independent however of that, by the express terms of the order, the fourth answer must be certified insufficient, before the defendant can be committed. Any deficiency in the fourth answer has been supplied by the fifth, so that the plaintiff has now a full answer. But the fifth answer might have been put in to save expense, as is not unfrequently advised by counsel, who even think the preceding answer sufficient.

The *Vice-Chancellor*.

[263]

There was a subsequent order in 1700,(c) by which upon a third answer being certified insufficient, the plaintiff might apply to commit the defendant.

(c) See *Beames' Orders of the Court of Chancery*, p. 317, 318.

fourth ; and on the report of insufficiency of the fourth, plaintiff may have the defendant stand committed; and he will not be discharged until he put in a full answer, and pay the costs of the contempt. Newland, vol. 1. p. 188. No regulations upon this point have been adopted in New-York. The court would therefore be guided principally by the character of the answer.

Sir *Samuel Romilly*.

Const
v.
Ebers.

The present application is not made upon that order ; but if it were, it is quite clear that in this case the defendant has accepted the fourth answer.

Mr. *Johnson* in reply.

I admit that the application is made upon the first order, and that I was not aware of the second having been made. I deny that the fifth answer has been accepted. The intention of the order, in requiring the report, is only to be informed of a fourth insufficient answer having been put in. All that is required is evidence of that fact. It does not signify how the Court is so informed. The Master, if applied to for a report, must answer, that there was nothing to report, as the defendant himself has admitted the insufficiency of his fourth answer. It is quite immaterial in what manner that insufficiency appears.

The *Vice-Chancellor*.

This application being to commit, must be clearly brought within the terms of the rule, which are, that it may be made upon a fourth answer being certified insufficient. The present application is without such certificate. It is however said, that there is no necessity for any report in this case. That raises the question, whether the report is essential or not to proceeding under the order. Now there is no affidavit of the fifth answer not having been accepted. If it has not been accepted, I do not see any difficulty in getting the report. The plaintiff does not proceed upon the order of 1700, and

Const
v.
Ebers.

the old order does not appear to have been ever enforced at all. There may even be a doubt whether it can be proceeded under, after the subsequent order of 1700. But without deciding that question, I think you cannot dispense with the certificate. The application is not within the letter of the order, and in a penal case I cannot dispense with the terms of the order.

*Before the
Vice Chan-
cellor,
June 11, 14,
1815.*

The motion was refused with costs.

RAY *versus* RAY.

After a
lapse of six or
seven years,
equity will
not restrain
by injunction
a creditor of
an executor
from taking in
execution the
goods of a tes-
tator, for the
executor's
own debt.

THE bill filed the 15th April, 1815, stated, that Golding Ray being indebted to the plaintiff in 1000*l.*, gave him his promissory note, bearing date the 4th April, 1809, for the payment of that sum with interest. Golding Ray by his will appointed Mary Ray, his wife, and his son, the defendant Golding Ray the younger, executrix and executor of his will. They proved the will on the 10th March, 1809, and possessed themselves of sufficient personal estate to pay his debts and legacies, and also took possession of a leasehold farm which had been occupied by the testator; and the lease thereof expiring, they procured a renewal of the same to be granted to them in their own names. The widow afterwards died, appointing her son her executor. The promissory note for 1000*l.* had never been paid. Johnson, one of the defendants, was a creditor of the other defendant, Golding Ray, but not of the testator, and had seized the said leasehold premises in execution for the said debt.

[265]

The defendant Johnson, by his answer, stated, that he was a bond-creditor for 700*l.* of the defendant Golding Ray. That the renewed lease was always treated and considered by Mary Ray and the defendant Golding

Ray as their own absolute property. That the plaintiff never having required payment of the promissory note until about the time when the defendant caused the said effects to be taken in execution, he therefore submitted that it ought now to be presumed that the debt had been given up. The executors having also been permitted to enjoy and deal with the farm and the stock and effects thereon as their own absolute property, and the defendant Golding Ray having been since permitted to enjoy the same ; in consequence whereof, defendant Johnson and divers other persons, believing the same to be his own property, had been induced to advance money to him ; he farther submitted, that the plaintiff was not entitled to the assistance of the court to defeat his the defendant's endeavours to recover what was justly due to him by means of the said execution.

Ray
v.
Ray.

The plaintiff having obtained an injunction to restrain the sale of the leasehold property under the execution, the defendant now moved upon the coming in of his answer to dissolve the said injunction.

Sir *Samuel Romilly* and Mr. *Mathews* in support of the motion.

Mr. *Cooke* against it.

In support of the motion it was contended, that this was an expedient to enable a debtor, who happened to be also an executor, to defraud his creditors. First, this court will not restrain the creditors of an executor from taking in execution the legal assets of the testator. Secondly, if it will, the court will not so interpose against what may be made assets in equity, if the creditors of

[266]

Ray
v.
Ray.

legatees choose to make it so ; for the lease is not at all events assets, because if it prove a lease of no value, the creditors and legatees may reject it. Thirdly, under all the circumstances, however, of this case, the court will not interpose, seven years having elapsed since the debt was contracted, and even all the original testator's debts (except the plaintiff's) and legacies appearing to have been paid. *M'Leod v. Drummond*(a) was referred to.

Against the motion it was contended, upon the authority of *Far v. Newman*,(b) First, that the goods of a testator in the hands of his executor cannot be seized in execution of a judgment against the executor in his own right ; Secondly, the renewed lease was in equity taken for the benefit of the testator's estate, and applicable to the payment of his debts, as in *James v. Dean*.(c)

June 14th.

The *Vice-Chancellor* having taken time to consider the case, this day gave his judgment.

[267] His Honor observed, that it was a case somewhat of novelty, and of considerable importance. It was a question how far a creditor of a testator could, in equity, restrain a creditor of the executor from selling goods taken under an execution, which though not at law the assets of the testator, yet it is argued, may in equity become his assets. Now, though the debt in this case existed in April, 1808, and the testator appears to have died soon afterwards, yet the present bill was not filed till the 5th April, 1815. It appears that all the debts of the testator

(a) 17 *Ves.* 152.

(b) 4 *Term Rep.* 621.

(c) 11 *Ves.* 383.

Ray
v.
Ray.

these paid, except the plaintiff's, and also all the legacies given by the testator's will. As to the principle upon which this bill is founded, that the goods of a testator in the hands of his executor cannot be seized in execution for a debt due from the executor in his own right, and for which *Farr v. Newman* is relied upon, that must not be understood as an universal rule. In that case the creditor had notice, and knew the property to be the assets of the testator. Mr. Justice *Buller* also differed from the other judges in that case, and those other judges even distinguished and admitted that in some cases it might be done, as where all the debts were paid. In that case too, the lapse of time was admitted by Lord *Kenyon* and Mr. Justice *Ashurst* to be extremely material to be considered. In the case of *Whale v. Booth*,^(a) Lord *Mansfield* observed, that the testator had died three years before the transaction in question, and if the executors paid all demands, the assets belonged to them: no demand was made by the plaintiff during all that time; and long before any demand was made, a fair creditor of their own sued out execution. That case is recognized in *Farr v. Newman*, as to the importance of time, although the law laid down in *Whale v. Booth*, is somewhat qualified in other respects. I think it also proper to advert in this case to an authority noticed by the judges in *Farr v. Newman*, I mean the case of *Aylesbury v. Harvey*,^(b) where a replevin was brought for a silver cup, and the defendant justified by a condemnation before the justices of peace, and a warrant made by them to levy a fine of 20s. set on the plaintiff. The plaintiff replied that J. S. made him executor, and he had the cup, and yet has it, as executor. The point adjudged was, that in that case

[266]

(a) Cited in the note to *Farr v. Newman*.

(b) 3 Lev. 204.

Ray
v.
Ray.

[269]

the goods of the testator might be taken for the debt of the executor; and the reporter states at the end of the case that the Court did not regard the plea, that he had it as executor so long ago; but they would intend the property altered notwithstanding the *ad hoc habet*, for it would be very perilous if such pleading were allowed. That case is mentioned by all the judges in *Farr v. Newman*, with perfect approbation. I have observed thus particularly upon these authorities, because if the property in the present case had been legal assets, the plaintiff would have had all the difficulty arising from the lapse of time, which is there so much mentioned. Here it is still greater, being between six and seven years. The plaintiff had forborne to make his claim when all the other debts were paid; when the legacies were afterwards paid; and when the lease was renewed in the executor's own name. The defendant swears he gave credit and advanced money upon the faith of its being the executor's own property. All this time the plaintiff lies by; and not until a creditor of the executor starts up, does the plaintiff ever make any claim. Even at law then it might be said to the plaintiff, you have induced the world to believe that it was the executor's own property. Then upon what principle of equity is the court to interfere with the right at law? If the plaintiff had any right to consider the renewed lease as made for the benefit of the testator's estate, is it not fair to say that he has waived that right at this distance of time? The defendant has the law on his side, and at least an equal equity with the plaintiff, arising from the credit which he has been induced by the plaintiff to give, from being led by the plaintiff to consider the lease to be the executor's own property. I say he has at least an equal equity; and I ask if he has not even a superior equity?

It cannot, therefore, see any ground for this court interfering with those rights of the defendant, after a lapse of six or seven years. It would be injurious to credit to do so, especially in the case of trades. But the present case has also in addition something of the appearance of being an endeavour on the part of one relation to interpose to protect another relation against a creditor's demands. I therefore, upon the whole, think the injunction must be dissolved, that is, so far as it interferes with the sheriff's proceeding to sell, for the purpose of satisfying the defendant Johnson's debt.

Ray
v.
Ray.

The order was accordingly made.

BRICKWOOD *versus* MILLER.

THE plaintiffs were the assignees of Thomas Ibbot Pierce, a bankrupt, under a commission issued before the stat. 49 Geo. III. c. 121. The defendant Miller, by his answer, which was filed some time after the passing the act, stated that he did not know, and could not form any belief, as to the petitioning creditor's debt, or any act of bankruptcy: and, in the usual language, craved leave to refer the plaintiffs to such proof thereof as they should be able to make.

[270]
[June 24,
July 12, 1815.

Order, after several witnesses had been examined, to withdraw rejoinder and rejoin *de novo*, for the purpose of giving notice, under stat. 49 Geo. 3. c. 121. s. 11. of the intention to dispute act of bankruptcy and petitioning creditors' debt: but upon the terms of undertaking to pay such costs as the court might afterwards direct.

The cause being at issue, all Miller's witnesses having been examined, and some also of the plaintiff's witnesses, and publication standing enlarged till the next seal, under an order for that purpose obtained by the plaintiffs; the defendant Miller, who had omitted to give the notice required by the 11th section of the act, of his

Brickwood intention to dispute the petitioning creditors' debt and an
 v. act of bankruptcy, now moved that he might be at li-
 Miller. berty to withdraw his rejoinder, and rejoin *de novo*, for
 the purpose of giving the notice.

The motion was supported by an affidavit of Miller's solicitor, stating that the notice was omitted to be given merely through inadvertency, and that he verily believed it was essential to the justice of the case that Miller should be at liberty to put the assignees upon proof of the petitioning creditor's debt and an act of bankruptcy.

[271] Mr. Lovat, for the motion, cited *Berks v. Wigan* (a) Sir S. Romilly against the motion.

The Lord Chancellor made the order; but upon the terms of the defendant Miller undertaking to pay all such costs as the court should afterwards think fit to direct, upon application to be made to it, on behalf of the plaintiffs for that purpose.

Before the
 Vice Chan-
 cellor.
 June 14, 1815.

STERLING *versus* THOMPSON.

Exceptions to a report may be taken off the file; if filed after the report has been confirmed absolute.

SIR SAMUEL ROMILLY moved to take exceptions to the Master's Report of the file for irregularity, the exceptions having been filed after the report had been confirmed absolute.

Mr. Girdlestone opposed the motion, as being con-

rary to the practice of the court ever to take exceptions off the file after they had once got on. It was true the report had been confirmed absolute, but the opposite party did not know of it till after the exceptions were filed; and this being a question of title to an estate, exceptions were the proper course to take the opinion of the court upon it. There was no instance of taking exceptions off the file, but they must be disposed of when the cause came on for farther directions.

Sterling
v.
Thompson.

The *Vice Chancellor*.

[272]

I should wish to have some authority for saying that which is irregular cannot be undone. If none is produced, it seems to me that the proposition is self-destructive.

No authority being produced, the order was made.



MILLER *versus* EATON.

Rolls.
June 17, 1815.

THE question in this case was, whether upon the construction of the will and codicil of Francis Miller, the testator meant his next of kin living at his death, to take vested interests in the residue subject to the contingencies therein mentioned, and which had happened; or whether he intended that his next of kin, who should be living at the death of the tenant for life who was entitled to the fund, were to have such residue

Upon the construction of a will, the gift of the residue after a life interest to the testator's next of kin; held to mean next of kin at the death of the wife, and not those living at the testator's death; they having express bequests under the will.

The said testator by his will, dated March 31st, 1777, bequeathed the residue of his personal estate upon trust

Miller
v.
Eaton.

[273]

among other things to raise the sum of 200*l.* and pay the same to his son John ; and he gave the interest of the residue of the said personal estate to the testator's widow for life ; and after her decease, one moiety thereof to his eldest son Christopher, and the other moiety thereof to the said John, his youngest son.

The testator afterwards made a codicil, dated April 11th, 1778, whereby he declared that in case his son Christopher should die in the lifetime of the testator's widow, and his son John should be then living, then he directed that his trustee should stand possessed of the moiety of his personal estate, so by his will directed to be paid to his son Christopher, in trust for his son John, and to pay the same to him when he should be entitled to the moiety given him by his will. And he declared that in case his son Christopher's wife should survive her husband, and the testator's son John should become entitled to the whole of the said residue, then he directed that John should pay to her for her life an annuity of 20*l.* But in case it should happen that Christopher and John should both die in the lifetime of the testator's wife he directed that after her decease the whole of the residue of his personal estate, after securing the annuity to Christopher's widow, should go to and be divided between and among all and every his the said testator's next of kin, in equal shares and proportions, share and share alike.

The testator left his widow, and Christopher and John his only children, him surviving. Christopher Miller died leaving the plaintiff his widow, and having made a will in her favour ; John Miller afterwards died, and the testator's widow also died.

The plaintiff as the executrix of Christopher, claimed a moiety of the residue in right of her said husband, as one of the next of kin of the testator Francis Miller living at his death. The defendants claimed under John the whole, as being the next of kin living at the death of the tenant for life.

Miller
v.
Eaton.

[274]

Sir *Samuel Romilly* and Mr. *Roupel*, for the plaintiff, contended that the next of kin living at the time of the testator's death were entitled. That as it did not appear either from any express words, or from the context of the will, or from both taken together, which description of next of kin the testator intended should take the residue; but as on the contrary the bequest was generally to his next of kin, without being confined to next of kin, at any particular time, the words could only be understood and taken in their legal sense and acceptation; and according to their ordinary construction must signify next of kin living at the time of the testator's death.

The Master of the Rolls, without hearing the counsel for the other side, determined that as the testator had given by express bequests to his sons who were his next of kin living at his death, that he must therefore when he used the terms next of kin, have meant his next of kin living at some other time than at his decease, because he had expressly provided for the persons who were his next of kin living at the time of his death.

Rolls.
June 19, 20,
1815.

SMITH *versus* CAMPBELL.(1)

Residue by will given "to my nearest surviving relation in my native country Ireland," brothers and sisters living, held exclusively entitled against nephews and nieces: but sisters resident in America not excluded.

JOHN SMITH, surgeon of his Majesty's ninety-fourth regiment by his will dated August 18th, 1807, he being at that time stationed in the East Indies, bequeathed the residue of his property as follows: "The remains of my property of every description to be sent home, as it may be realized, and equally distributed amongst my nearest surviving relations, in my native country Ireland."

By the decree made in the cause, it was referred to the Master to inquire and state to the court who were the next of kin of the said testator at the time of his death, and also who were the said testator's nearest relations living at the time of his death in Ireland.

The Master by his report stated, that the said testator had only one brother and four sisters living at the time of his death, namely, the plaintiff Smith, and the defendants Elizabeth Fulton, Isabella Love, Jane Dickson, and Mary Smith, and that the said Elizabeth Fulton, and Isabella Love, were for several years prior to the death of the said testator, and still are residing in the United States of North America. That the testator had another brother who died in his lifetime, leaving four sons. That the defendant George Love, who resided in Ireland, claimed in right of his wife Isabella, to be entitled, although she was at the time of the testator's death residing in the United States of North America.

[276]

The case came on upon the petition of the plaintiff, of

Jane Dickson, and of John Dickson the personal representative of Mary Smith, who were the nearest relations residing in Ireland at the time of the testator's death, praying a division of the fund.

Smith
v.
Campbell.

Mr. *Leach* and Mr. *Perkins*, for the petitioners, contended, that they were entitled to the exclusion of nephews and nieces, and also of the two sisters residing in America. Mr. *Hart* and Mr. *Trower*, for the sisters in Ireland. Sir *Samuel Romilly* and Mr. *Parker*, for the nephews and nieces.

The Master of the Rolls, after taking time to consider his judgment, said there were two questions in the case. First, as to the meaning of the words, "my nearest surviving relations." On the one hand, it was contended the testator's next of blood; on the other hand, that the next of kin were entitled according to the statute of distributions. The brother and sisters would be exclusively entitled in the one way of construing the words; nephews and nieces would share with them according to the other construction. June 20th.

His Honour thought there was no uncertainty whatsoever in the words "my nearest surviving relations" which the testator had used, but that they ascertained the testator's brother and sister, who were living, in preference to his nephews and nieces, who were the children of his deceased brother. In *Edge v. Salisbury*,^(a) the bequest was amongst the nearest relations; but as the plaintiffs and defendants in that case happened to

[277]

(a) *Amb.* 70.

Smith
v.
Campbell.

be related in the same degree to the testator, being his first cousins, and nephews and nieces, it was therefore not necessary to consider whether brothers and sisters of the testator would have excluded nephews and nieces. Even if the testator in this case had made use of the words "his next of kin," instead of his "nearest surviving relations," yet if there had been nothing in the will to show that he meant the next of kin according to the statute of distributions, I should have thought the brothers and sisters would have been exclusively entitled. In the case of *Phillips v. Garth*,^(a) the contrary was however decided by Mr. Justice *Buller* sitting for the *Lord Chancellor*. It was there held that next of kin comprehended nephews and nieces, as well as the testator's surviving brothers. That case, indeed, afterwards came before Lord *Thurlow*, but not on the above point. The inclination however of his Lordship's opinion was so strong against Mr. Justice *Buller's* decision, that he directed the case to stand over, in order that the brothers might present a petition of rehearing. In *Garrick v. Lord Camden*,^(c) Lord *Eldon*, referring to Lord *Thurlow's* doubt upon the case before Mr. Justice *Buller*, states his own opinion as agreeing with Lord *Thurlow's* upon that decision. His honour considered the present case as untouched by any former determination; and he was of opinion, that under the words nearest surviving relations, and nephews and nieces had no claim.⁽¹⁾

(a) 3 Br. C. C. 64.

(b) 14 Ves. 372. 385.

(1) The principle settled in *Thomas v. Hale*, Cas. Temp. Talb. 251., the leading case is, that the term *relations* should be confined to such relations as are within the statute of distributions, though the statute may not form the rule of apportioning the shares. See

Secondly. The next question was as to the meaning of the testator's words, "in my native country, Ireland." Do they demonstrate the place in which his relations were to reside who should be entitled? Is their being so resident a condition which they must fulfil in order to take? Or is the place of their residence immaterial? It seems to me that the testator only meant to designate the place where his relations were to be found. He desires that his fortune may be sent home. If he had stopped after using those words, there might have been a difficulty to know where he meant by the word "Home," and he therefore adds, "in my native country, Ireland," He had left relations there, and he supposed them still remaining there. The words may be words of restriction, or of superadded description of the place where he thought his relations were living. I think they are only the latter. He does not put Ireland in contradistinction to any other country. If a distinc-

Smith
v.
Campbell.

Widmore v. Woodroffe, Amb. 640. *Harding v. Glyn*, 1 Atk. 469. *Green v. Howard*, 1 Br. C. C. 31. *Rayner v. Mowbray*, 3 Br. C. R. 234. and *Pope v. Whitcombe*, 3 Mer. 589. The shares of the property will be governed by the will. *Thomas v. Hale*, ut supra.

The principal case settles that the term *nearest*, will limit the bequest to the next of blood. *Whithorne v. Harris*, 2 Ves. sen. 526. does not touch the question of limiting the bequest, no nearer relations applying than first cousins; and the question being between them and second cousins. In the report in 19 Ves. 403. the Master of the Rolls states, that the term *near relations* receives the same construction as relations extending to next of kin under the statute, and confined to them. The effect of the terms *next of kin*, without words to designate their meaning, is left unsettled, as the positive decision of J. Buller extending them to all persons who would take upon intestacy under the statute, is shaken by the remarks of the Master of the Rolls in the principal case, and of Lord Eldon in *Garrick v. Camden*.

Smith
v.
Campbell.

tion of that kind had been meant, it is probable that he would have expressed it. It is not very likely that he should have meant that only such of his relations who were domiciled in Ireland should take under his will, he himself having gone to seek his fortune in another country. I think, therefore, though there is an ambiguity in the expression, yet that he intended his sisters in America, as well as his brother and sister in Ireland, were to take under his will. It is quite settled that an inaccurate superadded description of objects will not vitiate, if they are in all other respects correctly described.

[279]

Rolls.

June 19, 20,
1815.

WETHERBY *versus* DIXON.

Legacy of
1000*l.* not
adeemed by a
transfer by the
testator of
stock into his
and legatee's
joint names.

THOMAS NEATBY, by his will, dated the 7th of June, 1809, bequeathed to the plaintiff the principal sum of 1000*l.*, then due and owing to him the said testator on mortgage of premises, in Nicholas-Lane, Lombard-Street, from Samuel Scholey; provided nevertheless, and it was his will and mind, and he thereby directed that if the said sum of 1000*l.* should happen to be paid to him the said testator before his decease, then that the said legatee therein before directed to be paid out of the said sum which should or might be paid to the testator in his lifetime, should be paid such sum therein before given to him out of the rest residue and remainder of the testator's estate and effects thereafter given to Mrs. Ann Stubbs, the wife of Richard Stubbs.

The bill was filed by the plaintiff to be paid the said legacy. The defendants, who were the executors and

residuary legatees, by their answer stated, that in the month of August, 1810, the mortgage money due from Samuel Scholey was paid off, and that the said Thomas Neatby paid the same into his banker's, and that in the same month of August, the said testator purchased 700*l.* 3 per cent. reduced bank annuities, at the price of 69½ per cent.; and that in the month of November, 1810, he purchased in his own name the sum of 1,300*l.* 3 per cent. reduced bank annuities, at the price of 65*l.* per cent.; and that in or about the month of July, 1811, he purchased, in his own name, a farther sum of 400*l.* 3 per cent. reduced bank annuities, at the price of 62½ per cent., making with the said former sums of 700*l.* and 1,300*l.*, the sum of 2,400*l.* 3 per cent. reduced bank annuities; and that on the 5th of August he transferred the said sum of 2,400*l.* 3 per cent. reduced bank annuities into the joint names of himself and the plaintiff.

Wetherby
v.
Dixon.

[280]

The cause was heard upon bill and answer.

Mr. *Leach* and Mr. *Heys* for the plaintiff.

Sir *Samuel Romilly* and Mr. *Shadwell* for the defendant.

For the plaintiff it was argued, that he was entitled to the legacy of 1000*l.* although the mortgage had been paid off, and the transfer of the stock made into the joint names of the testator and the plaintiff. The plaintiff stood in the situation of a common legatee, no relationship even appearing in evidence to have existed between the testator and him.

For the defendants it was argued, that the paying off the mortgage and subsequent transfer of the stock, was

Wetherby
v.
Dixon.

an ademption of the legacy of 100*l.* given by the will, and that the plaintiff could not be entitled to both. The plaintiff was, in fact, the testator's natural son. In *Trimmer v. Bayne*(*a*) a legacy to a natural child was held satisfied by a portion.

June 20th.

The *Master of the Rolls*.

[281]

It is admitted, that in general a man is entitled to the benefit of as many gifts as another chooses to bestow upon him, and that a second is not a substitution of a first; but it is not so as to a debt. Judges in equity have thought a portion was in that respect like a debt. The rule, however, is confined to the case of a legitimate. The donor must be a parent, or a person placing himself *in loco parentis*. It is impossible to refuse to assent to the distinction laid down by the Lord *Chancellor*, in *Ex parte Dubost*,(*b*) between legitimate and illegitimate children, in regard to the satisfaction of a legacy by a portion, although it gives the latter an advantage over the former. In the present case the testator has not recognized any relationship whatever subsisting between himself and the legatee. In consideration of law none existed. This is not the case of a parent, or of a person acting as a parent, or discharging parental duty towards the legatee. The legacy differs in nothing from one to a mere legatee. Now, it has never been determined that a gift to a mere legatee is an ademption.

(*a*) 7 *Ves.* 508.

(*b*) 18 *Ves.* 140.

Nothing therefore operates to prevent the plaintiff from claiming the legacy given by the will.(1)

Wetherby
v.
Dixon.

Decree for the plaintiff.

WALLIS *versus* GLYNN.

[282]
May 11,
June 26, 1815.

A MOTION was made to discharge an attachment which had issued for want of an answer, upon the ground of an order for time to answer having been obtained by the defendant, just before the attachment issued, and which time was not yet expired. It appeared by affidavit, that the defendant had obtained an order for time, but that he had only served a copy of the order upon the plaintiff's clerk in court, without having produced the original. It was also stated, that the copy was incorrect, purporting to be for a month's time to answer instead of six weeks, which had been obtained.

Attachment not discharged though order for time had been obtained. Service of a copy of the order not being good service, unless the production of the original is dispensed with by the opposite party.

Sir *Samuel Romilly*, in support of the motion, contended, that it was not usual in practice to show the original, and that the plaintiff's clerk in court ought to have sworn in his affidavit against the present motion, that he believed no such order was obtained.

(1) The artificial character of the reasoning upon which these cases have proceeded, is shown clearly by the result, that a gift to a child is to be held an ademption, when if made to a stranger it is not. The idea of an advance or gift to a child being the discharge of a debt is certainly very technical. See *Grave v. Salisbury*, 1 Br. C. C. 425.

Wallis
v.
Glynn.

Mr. *Hart*, against the motion, insisted that by the practice the original should be produced.

The Lord Chancellor.

I believe it is the practice to show the original order upon serving a copy, unless it is dispensed with.

June 26,

[283]

The motion having stood over, in order that the defendant's solicitor might make an affidavit upon the subject, such affidavit was afterwards filed; but the same not being satisfactory to the above point, the Lord *Chancellor* gave judgment upon the motion. His Lordship stated that he understood that by the strict practice it was not enough to show the copy of an order; that in the present instance the solicitors on both sides seemed to have acted according to the strict practice, and therefore the attachment could not be touched.

The motion was refused.

Rolls.
June 21, 26,
1815.

ADAMSON versus ARMITAGE.

A bequest of "the balance of my account with the interest thereon, to be vested by my executors in the hands of trustees whom they shall choose and name, the income arising

BENJAMIN HAY, by his will, dated the 22d November, 1811, bequeathed as follows:—"I give and bequeath unto my very trusty and valuable servant Lydia Adamson, the balance of my account in Mr. Downing's Hands, with the interest thereon, to be vested by my executors in the hands of trustees, whom they shall choose and name, the income arising therefrom to be for her own sole use and benefit."

On a bill filed by Lydia Adamson against the executors, for the purpose of being satisfied the above legacy, a question was made, whether the plaintiff was entitled to the above legacy absolutely, or only for her life.

Adamson
v.
Armitage.

Mr. *Hart* and Mr. *Horne* for the plaintiff, contended that she was entitled to the absolute property, and referred to *Elton v. Shephard*.^(a) There was no disposition over of the legacy. The subsequent words do not abridge the effect of the prior ones, and the words "sole use and benefit," give it to her separate use, without any necessity for the word "separate" being used in the will.

therefrom to be for her sole use and benefit," is an absolute interest, and not a life estate merely. The prior gift of the fund is not limited by the subsequent mention of its produce, and the direction as to trustees is not restricted.

Sir *Samuel Romilly* and Mr. *Heald* for the defendants. The income to arise from interest and dividends is only given to the legatee, and the direction in the will that the trustees should be appointed by the testator's executors would be otherwise of no use. There is nothing in *Elton v. Shephard* but the *dictum* of Sir *Thomas Sewall*, which at all applies to the present case.

Mr. *Hart* in reply, mentioned a case of *Rawlins v. Carr*. The testator, by separating this fund, and directing the appointment of trustees of it, shows that he did not mean that it should return again into his general personal estate.

The Master of the Rolls.

The proposition stated by Sir *Thomas Sewall* may not have been strictly necessary to the decision of the

(a) 1 Bro. 532.

Adamson
v.
Armitage.

case, but it is conformable to the subsequent authority of *Philipps v. Chamberlaine*.^(a) Though it is otherwise with respect to real estate ; yet in the case of personality, words of qualification must be used to give a life estate only. *Prima facie* general words will give the whole interest in the latter, though only a life estate in the former. It is not necessary, however, here to call in aid that doctrine. The entire fund is here given, and therefore words would be necessary to reduce that. The testator gives "the balance of his account in Mr. Dowling's hands with the interest, thereon," and then comes a direction to vest it in trustees, hands, and "the income to arise therefrom to be sold for her sole use and benefit." Now, although the gift of the produce merely would only carry a life interest, yet the prior gift is of the fund itself, and the direction as to the trustees will not limit it. What the testator says relative to trustees is only directory, and not restrictive ; that is, the legatee is to enjoy it in that mode. I think also, the words "for her sole use and benefit" would vest the property exclusive of the marital right. There was a case mentioned in *Lumb v. Milnes*,^(b) where Lord *Alvanley* held that a disposition to the wife for her own use, must be intended for her separate use. I am clearly of opinion that the legatee is entitled to the absolute interest.⁽¹⁾

(a) 4 Ves. 51.

(b) 5 Ves. 517.

(1) See *Robinson v. Dugate*, 2 Vern. 181. *Barford v. Street*, 16 Ves. 135. *Irwin v. Farren*, 19 Ves. 86. An estate for life with an unqualified power of appointment by will or otherwise of the inheritance, gives an absolute interest.

Ex parte JACKSON.

June 27, 29,
1815.

THE question in this case was, whether a bankrupt could be chosen the assignee of his own estate and effects.

A bankrupt himself cannot be chosen the assignee of his own estate.

It was the petition of Henry Jackson, the bankrupt, who had been chosen such assignee, and sought of the court to have the choice confirmed.

An order had been made on the 2d March last, for discharging former assignees, and for directing the creditors to choose new ones. A meeting of the creditors had accordingly taken place on the 15th April last, when the bankrupt was chosen assignee without any opposition. He was stated to have passed his last examination, and to have received his certificate.

Sir *Samuel Romilly* contended that there was no objection upon general principles to such a choice, and that a bankrupt might be assignee of his own estate, just as well as a trustee or executor of another person's. There was even a precedent for it in a case before Lord *Hardwicke*,^(a) on the 22d June, 1737, of Daniel Cowper, a bankrupt, who had not only been chosen assignee of his own estate, but had even signed his own certificate, and which the Lord *Chancellor* had approved of.

Mr. *Hart* and Mr. *Bell*, on the part of several creditors, objected to the choice, contending that the law had [287] divested the bankrupt's property out of him, and that there were also duties to be discharged by an assignee, which the bankrupt could not discharge.

(a) *Greene's Bankrupt Law*, 260.

Exparte
Jackson.

The Lord *Chancellor*, upon looking at the case referred to, observed that the bankrupt had there signed the certificate as representative of his father, who was a creditor. His Lordship said he would look into the records in the bankrupt's office for the particulars of that case. The present case, however, was to be decided, not upon the right of the bankrupt being himself a creditor by representation, but on the rights of the other creditors. If any body had asked whether in sending it to the creditors to choose new assignees, it was meant that the bankrupt should be chosen, his Lordship would have answered that he had no such intention. It was matter of absolute surprise to him to hear of such a thing taking place. The circumstance of having obtained the certificate made no difference. Creditors often think proper to give a bankrupt his certificate to obtain his testimony. But if he is to be the plaintiff in actions brought to recover the bankrupt's property, there is an end of his testimony.

June 29th. The next day his Lordship sat, he stated that he had searched the books in the bankrupt's office, in which orders of dismissal of petitions, as this was stated to have been, were entered, but that there was no trace of the case which had been cited. It might, however, have passed in court as far as the case was intelligible ; for it was not to be supposed that Mr. Greene would have inserted it in his book without any authority. On looking through the statutes and authorities, his Lordship could not, however, bring himself to confirm the choice made of the bankrupt as assignee, if any other person could be found. Without therefore going through the particular grounds for his opinion, which however, he

said, he would state, if any gentleman wished it, he thought there must be an order made for the creditors to proceed to a new choice.

Exparte
Jackson.

His Lordship afterwards added, that on looking at every step to be taken under the bankrupts laws, it was impossible not to see that the bankrupt could not be assignee. For instance, what was to become of the covenants entered into by him as assignee with the commissioners ?

WICKHAM *versus* WICKHAM.

Rolls.
July 4, 1815.

AUGUSTA ANN HATFIELD KAYE, by her will dated the 22d April, 1801, devised and appointed her real estates to the following uses ; that is to say, “ to the use of “ Mrs. Wickham Provost for her life without impeach- “ ment of waste farther than wilful waste, and after her “ death to the use of the child, of which she is now “ pregnant, in case it shall be a daughter, for her life “ without impeachment of waste, and after the death “ of the said daughter to the use of the first and every “ other son severally and successively in tail male, and “ failing such issue, or if the child of which the said “ Mrs. Wickham Provost is now pregnant should prove “ a son, then I give the said lands and hereditaments to “ Bell Wickham Provost the younger for her life with- “ out impeachment of waste other than wilful waste, “ and to her first and every other son severally and suc- “ cessively in tail male, and failing such issue, to the use “ of Stephens Dinley Totton his heirs and assigns for “ ever.”

Tenant for life without impeachment of waste other than wilful waste, held entitled to the interest of money produced by sale of timber. Any claim of tenant for life to cut timber is a question at law only.

[289]

Wickham
v.
Wickham.

The question was who was entitled under the above will to the purchase money of timber fit to be cut upon the said estate, whether the tenants for life, or the owner of the first estate of inheritance?

Sir *Arthur Piggott*, Sir *Samuel Romilly*, Mr. *Hart*, Mr. *Cook*, and Mr. *Benyon*, for the two different tenants for life, contended, that upon the construction of the will they were entitled to every fair profit of the estate, doing no mischief, being in effect only impeachable for, what is termed in equity, destruction, such as cutting young trees not fit to be cut. But at all events, the tenants for life were entitled to the interest of the money produced by the sale of the timber. *Powlett v. the Duchess of Bolton*,^(a) and *Tully v. Tully* there cited.

[290] Mr. *Leach* and Mr. *Shadwell*, on the other hand, contended that the tenants for life were impeachable of waste other than permissive waste, there being no distinction between voluntary and wilful waste. They relied upon *Bewick v. Whitfield*^(b) as settling that the tenant for life was only entitled to have sufficient left for repairs, and allowance for damage done on the ground, but not to have any allowance for the timber, which belongs to the first owner of the inheritance.

The *Master of the Rolls* determined upon the authority of an unreported case of *Osborn v. Osborn* before Lord *Eldon*, that the tenants for life were entitled to the interest for their lives of the money produced by the sale of the timber. As to the right of the tenants for life to cut timber, his honour seemed to consider that if they claimed any such right, it was a question at law only.

a) 3 *Ves.* 374.

(b) 3 *P. W.* 266.

Ex parte BRIDGES.

July 13,
1815.

THE Master in this case having reported that Fearnley, a lunatic, was a trustee within the meaning of the late act,(a) and the court having thereupon ordered his committee to convey, the application stood over till this day for the purpose of determining whether the committee should not have his costs.

Costs of the committee of a lunatic trustee, conveying within the statute, must be paid out of the lunatic's estate.

Mr. *Temple* contended that the committee was entitled to his costs like any other trustee.

Sir *Samuel Romilly* opposed it.

[291]

The *Lord Chancellor* determined that the estate of the *cestui que trust* must not bear the expense, but that it must be paid out of the lunatic's estate, and said that the rule was so.

WILLAN versus WILLAN.

July 14, 15,
1815.

A MOTION was made on the part of the plaintiff that the Master to whom this cause stood referred, might be directed to receive such evidence as the plaintiffs proposed to lay before him by the affidavits of competent witnesses sworn for that purpose, or to examine witnesses upon interrogatories before the said Master, in order to repel the claim of the said defendant in respect of im-

After publication passed, before the hearing witnesses cannot be examined in the Master's office as to any of the same facts, without special order. A petition was directed to be presented.(1)

(a) 4 G. 2. c. 10.

(1) See *Office and Duties of Masters in Chancery*, p. 43.
VOL. I. 40

Willan
v.
Willan.

provements, alleged to have been made by him, on the farms and lands in question in the cause during his occupation thereof.

Depositions had been taken by the examiner before the hearing.

By the decree, the Master was, amongst other things, directed to inquire and state whether any and what lasting improvements had been made by the said defendant, or by any of his under-tenants upon any of the premises.

[292] A state of facts had been carried in by the plaintiff, and interrogatories left to be settled by the Master, but he had written underneath the draft interrogatories, as follows: "17th April, 1815. The depositions taken on the part of the defendants having been published by the examiner, and office copies thereof taken by the solicitor of the plaintiffs, I think I am not authorized to sanction an examination of witnesses on the part of the plaintiffs to the same matters; and if the plaintiffs are entitled now to examine witnesses, I apprehend the interrogatories are not to be settled by me without the special order of the court. I. S. Harvey."

Mr. *Fonblanque*, Mr. *Hart*, and Mr. *Trower*, were in support of the motion. *Parkinson v. Ingram*(a) was cited by them, and *Shepherd v. Collyer*, in 1744, there referred to.

Sir *Samuel Romilly* and Mr. *Leach* opposed the motion.

(a) 3 Ves. 608.

Willan
v.
Willan.

The *Lord Chancellor* said, that after publication passed prior to a decree, and the dispositions had been seen, it was quite clear that farther witnesses could not be examined without leave of the court, which could not be obtained but with great difficulty, and that as to particular facts only. (a) But when a decree directs particular inquiries to be made, the court thereby in effect does give leave to examine witnesses as to the subject of the inquiries. The Master cannot, however, examine a witness who has been examined in chief without leave of the court. It was settled by Lord *Hardwicke* that the Master could re-examine a party in the cause without leave, but not a witness, because the decree was that he might examine parties as he should see fit, and he settles the interrogatories for the examination of the parties, but not for the examination of the witnesses. As the present case involves an important point of practice, I desire the Register to furnish me with the Register's book of the case of *Shepherd v. Collyer*; and if necessary I will call upon all the Masters to certify as to the point of practice.

{ 293 }

This day his lordship mentioned that he had read the above case of *Shepherd v. Collyer* from the Register's book, and which case goes to prove that the Master is right in the objection he now makes. It appears there was a direction in that case for the Master to inquire as to the value of an estate; witnesses had been examined, and their evidence communicated to both parties; afterward it was conceived that the evidence of another particular individual, being the tenant of the estate, was necessary to be had upon the subject of the value of the estate. A special application was made to examine that particu-

(a) See *Purcell v. Macnamara*, 8 Ves. 324.

Willan lar individual. As far as the case goes, therefore, it con-
 v
 Willan. firms the judgment of the Master that a special order is
 necessary.

The application stood over, his lordship directing that a petition should be presented, stating the particular circumstances of the case, with dates.

[294]
 July 14,
 1815.

PIETERS *versus* THOMPSON.

Plaintiff put
 to his election
 where suing
 in this court,
 and in a for-
 eign court of
 law.(1)

SIR SAMUEL ROMILLY moved, that all farther proceedings in this cause might be stayed, the plaintiffs having instituted proceedings in this honourable court, and in one of the judiciary courts at *Amsterdam*, for one and the same matter, and having since made their election to proceed in the said last-mentioned court; and that the plaintiffs might pay the costs of the proceedings here subsequent to their having so elected to proceed in the court at *Amsterdam*.

Mr. *Agar* opposed the motion.

The *Lord Chancellor* directed that an Affidavit should be produced, verifying a letter from the Agent of the de-

(1) In *Bushby v. Munday*, 5 Mad. Rep. 297. an injunction was granted to stay proceedings in the Court of Sessions in Scotland, a suit being instituted in the Court of Chancery in England. The Vice Chancellor said, it did not break in upon the absolute independence of the Court of Session, but touched only the party affected by it.

pendant at *Amsterdam* to the defendant here, mentioning the fact of the plaintiff having elected to proceed there.

Pieters
v.
Thompson.

Ex parte BROWN, in the matter of SIR JOHN NORRIS'S Charity.

[295]

Jan. 31,
July 30,
1815.

THIS was originally a petition presented under the late act of parliament,^(a) by *Zachariah Boulk*, and several other persons; and it is stated that *Sir John Norris* had, by an indenture bearing date Jan. 10th, 1609, conveyed to certain trustees therein named, their heirs and assigns forever, all those little piddles and parcels of ground in the parish of Bray, in the county of Berks, whereon several cottages were then erected and built, containing by estimation five acres, which were therein mentioned to be lands assorted, or purpessures within the said parish, or the perambulation thereof; and also all manner of gardens, backsides, rents, and all other profits and appurtenances whatsoever thereunto belonging, in as beneficial a manner as the same were granted to him by certain letters patent therein mentioned, to hold the same to them, their heirs and assigns, upon certain charitable trusts, therein mentioned. In the month of July, 1700, an inquisition was taken at Maidenhead, by virtue of a commission under the great seal of England, for that purpose, by virtue of which the said commissioners ordered that the several persons therein mentioned to be in possession of the said cottages and lands, should forthwith quit the possessions thereof unto the then surviving trustee of the same, and that new trustees should be appointed of the said charity

Constructive trusts held not within the 52 Geo. 3. c. 101. which gives relief upon petition in the case of charities.

(a) 52 Geo. 3. c. 101.

**Ex parte
Brown, in the
Matter of
Sir John Nor-
ris's Charity.**

estate. In the year 1723, the heir at law of the said surviving trustee conveyed the said charity estate to new trustees. In the year 1740, a bill by way of information was filed in the high Court of Chancery, against the then occupiers of the said charity estate, to compel them to deliver up possession thereof ; and that the several occupiers of the said premises, or the greater part of them thereupon, without putting in an answer to the said bill, agreed by writing under their several hands, to attorn tenants of the said premises to the then trustees thereof, and acknowledged by the same writing the said charity premises to be in their several occupations. The petition alleged that a particular description of such charity estates, so attorned to, is contained in a book signed by the then tenants of the said charity estates ; that such book has ever since remained in the hands of the church-wardens of the said parish of Bray ; and that the said charity estates have, by divers conveyances, become vested in the said petitioners Zachariah Boulton and several other persons, upon the trusts of the said charity. That through the negligence of the former trustees thereof, since the year 1743, the charity estates have come into the possession of persons not objects of the said charity ; and that many of them refuse to acknowledge the right of the said charity, and claim the respective possessions as their own absolute inheritance ; and that Brown and others dispute the claim of the said charity trustees, and pretend to hold the cottages, pieces of lands, and premises, which are in their possession respectively, as their own absolute property, insisting that the same never belonged to the said charity ; whereas it was insisted that the said several cottages, pieces of land and premises, so in the possession of Brown and the other persons named in the petition, are parts of the premises granted by the said Sir John Norris, upon

the charitable trusts aforesaid. The petition therefore of Boulton and the other trustees prayed that the said premises so severally occupied by Brown and others, might be declared to belong to the said charity, and to be vested in the said trustees upon the trusts thereof; and that Brown and the other persons therein mentioned to be in the several occupation of the said premises might be severally decreed and ordered to give and deliver up to the said trustees, possession of the said premises so occupied by them respectively; and that they, together with other persons therein mentioned, might pay the costs of the said petition, which they were therein alleged to have rendered necessary by disputing the right of the said trustee on behalf of the said charity to the said pieces of land in their possession respectively.

Ex parte
Brown, in the
Matter of
Sir John Nor-
ris's Charity.

The said petition came on to be heard on the 28th day of February last, when the *Lord Chancellor* was pleased to order that the said petition should stand dismissed as against Lucy Hyde without costs; and as to the other parties, it was ordered that it should be referred to one of the Masters of the court to inquire whether the estates claimed by Brown and the others were the charity estates, and the consideration of all farther directions, and of the costs of the said application as to the said other parties were reserved until after the said Master should have made his report, with liberty to apply as there should be occasion.

Against this order, *Brown* and several other persons whom it prejudiced now presented a petition, praying that it might be discharged, and which last mentioned petition now came on to be heard.

Exparte
Brown, in the
Matter of
Sir John Nor-
ris's Charity.

Mr. *Hart* argued that the act of parliament did not give the court of chancery jurisdiction upon petition, to make any order against a party claiming by adverse title to a charity ; but that in such a case an information was the proper remedy. Your Lordship decided this point in the case of Dr. *William's* trust some short time ago. The order which has been made in the present case, having been made in a summary way, is in that respect defective.

Mr. *Leach*, in support of the order, relied upon the words of the statute, as expressly declaring that an order shall be final and conclusive, unless there shall be an appeal to the house of lords within two years. The appeal therefore lies there. This order has been past, and entered by the proper officer. But the order is right, the court having jurisdiction by the express words of the act, "in every case of the breach of any trust, or supposed breach of any trust, created for charitable purposes, or wherever the order or direction of a Court of Equity shall be deemed necessary for the administration of any trust for charitable purposes." Now, wherever lands are acquired belonging to a charity by any person, he becomes a trustee for that charity, unless he is a purchaser for a valuable consideration without notice. But the fact appears in this case, that the party does not sustain that character.

Mr. *Hart* in reply.

[299] It could never be meant by the legislature that an order obtained by surprise, for instance, could only be relieved by appeal to the house of lords. This is like the jurisdiction in bankruptcy, in which the Chancellor

may review his own judgments, though the bankrupt statutes give him no express authority so to do. In the next place, the words of the act do not apply to constructive trustees, but only to actual trustees.

Ex parte
Brown, in the
Matter of
Sir John Nor-
ris's Charity.

Sir Samuel Romilly, as *amicus curiæ*, begged to observe that a party taking lands as in this case, could not be deemed guilty of a breach of trust, within the words of the statute, because he was not in fact a trustee till he took the assignment, even if he were afterwards. He farther stated that the Vice Chancellor had determined that he could not upon petition set aside a lease, or even an agreement for a lease of charity lands.

The *Lord Chancellor*.

As this is a question of considerable importance, I shall take time before I determine it, and also to consider whether an explanatory act is not required.

This day his lordship stated that his opinion upon this case was, that constructive trusts were not within the meaning of the act.

MOORHOUSE *versus* DE PASSOU.

[300]

Rolls.
July 18, 1815.

A QUESTION in this case arose upon reading evidence, whether an objection to the competency of a witness upon the ground of interest, had not been waived by the opposite party having cross-examined such witness.

Cross ex-
amining a wit-
ness in equity,
is no waiver
of an objec-
tion on the
ground of in-

Moorhouse
v.
De Passon.

terest, to the
competency
of such wit-
ness.

The defendant had examined the witness in chief; and the plaintiff, at the end of a string of interrogatories, put the question as to the interest of the witness. The witness admitted his being interested.

It was contended that a party after examining a witness, and finding that his evidence was unfavourable, could not then turn round and object to the competency of such witness.

The *Master of the Rolls* took some time to consider of the objection, and on the above mentioned day, determined in favour of the objection to the evidence. He observed, that the case of *Scott v. Fenwick*,^(a) was in point. His own industry had enabled him to find one other case also in point, namely, that of the *Corporation of Sutton Colefield v. Wilson* (1)

[301] These two cases were, however, irreconcilable. Considering the question, then, upon principle, he thought the cross-examination was no waiver in equity. At law a witness was examined as to his interest upon the *voir dire*; but in equity the party intending to try the competency of a witness upon that ground, had no opportunity of doing so. He could know nothing of his evidence till publication. The objection, therefore, could only be known after the examination had taken place.

(a) *Gwill.* 1250.

(b) 1 *Vern.* 254.

(1) The witness was held to be made competent by the cross-examination: he was a member of the corporation filing the bill.

GARDNER *versus* MARQUIS OF TOWNSHEND.

Rolls.
July 17, 18,
1815.

In the year 1807, the defendant, George Ferrars Townshend, Marquis Townshend, by his then description of the right honourable George Ferrars Townshend, Lord Chartley, eldest son and heir apparent of the right honourable George Earl of Leicester, since deceased, which said George Earl of Leicester was the eldest son and heir apparent of the then George Marquis Townshend since deceased, upon his intended marriage, covenanted that he would well and sufficiently convey and assure, or cause or procure to be conveyed and assured, freehold manors, messuages, lands, tenements, or other hereditaments of the clear yearly value of 4000*l.* to the uses in such settlement expressed.

A party entitled as equitable tenant in tail, under a settlement in which is a covenant to convey lands to the uses of such settlement; afterwards and upon his own marriage, covenants also to convey lands of less value: though he obtains a decree for the execution of the first mentioned covenant, the second covenant is no lien in equity upon the lands so decreed to be conveyed.

The defendant was entitled, at the time of executing the above settlement, under the marriage settlement of the said George Marquis Townshend, to have real estate of the clear yearly value of 5,000*l.* conveyed amongst other uses, to himself in remainder in tail. In 1808, being after his said marriage, the defendant filed his bill for the execution of the last mentioned covenant, and which was decreed in 1810.

[302]

The plaintiff filed the present, which was a supplemental bill, charging that the real estate of 5,000*l.* which the defendant had by the said decree been declared entitled to have settled upon him, was the only property, which he had to answer or satisfy the covenant in his own marriage settlement, whereby he was bound to settle real estate of the value of 4000*l.* per annum, for the benefit of his wife and children.

Gardner
v.
Marquis of
Townshend.

The bill prayed that the covenant to settle lands of 5,000*l.* per annum might be declared a lien in equity upon the lands of 5,000*l.* per annum, decreed to be settled upon the defendant.

Mr. *Benyon* for the plaintiff referred to the authorities of *Deacon v. Smith*,^(a) and the rule as laid down by lord *Talbot* in *Lechmere v. Lechmere*^(b) as establishing the principle, that where a party covenant to convey and settle lands and tenements to certain uses, and he afterwards purchases lands, but does not make any settlement of them pursuant to the articles and covenant, that the after purchased lands shall be to the uses of the settlement. He contended that the present case came within that principle.

[303]

The Master of the Rolls, without hearing the other side, was of opinion that although a person who purchased lands, having entered in a prior covenant to convey and settle lands, might be presumed so to purchase in discharge of his covenant, yet that in the present case, Lord *Townshend* could not be considered as in the light of a purchaser so liable ; but was in fact entitled in equity to the lands in question at the time of his entering into the covenant ; and that his afterwards getting a decree for an actual conveyance from the trustees could make no difference. He therefore thought that the present bill could not be sustained.

Bill dismissed.

(a) 3 *Atk.* 323.

(b) *Cases, Temp. Talbot*, 93.

PLATTS *versus* BUTTON.July 27,
1815.

A MOTION was made for an injunction to restrain the publishing or selling copies of the music of certain dances, specified in the bill, and notice of motion.

It appeared by the affidavits that one tune had been published seventeen years; others later; and one in 1814.

The defendant swore, that the music having been published by other music-sellers, they, the defendants, have copied the tunes, being ignorant that they were the property of the plaintiff.

If the proprietor of a work gives permission to several to publish it, and then others copy it, he must bring his action before he can have an injunction to restrain the pirating his copy-right.

Mr. *Hart*, and Mr. *Trollope* for the motion.

[304]

Sir *Samuel Romilly* against it, made another objection besides the publication above mentioned, namely, that there was no affidavit of title filed by the plaintiff, till after the defendants had put in their answer, which had been held could not be done.

The *Lord Chancellor* said that the giving permission to some persons to publish, and then others copying, rendered it necessary for the plaintiff to bring his action at law, before he could come for an injunction to this court.

July 24,
1815.

ROE *versus* GUDGEON.

The court refused to order money to be paid into court, appearing upon books deposited in the Master's office.

[305]

UPON an application to compel the defendant to pay into court a balance, stated to appear upon certain books of account, deposited by the defendant in the Master's office ; it appeared that the plaintiff being an infant, had filed his bill for an account against the defendant, to whose answer exceptions had been taken for not setting out the account. The question of insufficiency for not setting out the account had been before the court upon exceptions to the Master's report. The defendant swore, that his reason for not setting out the account was, that it was so voluminous, that the stamps to the schedule would alone cost 29,000*l*. The court thereupon had ordered the defendant to deposit the books of account in the Master's office, to be considered as part of the answer. Upon an examination of the said books, the plaintiff founded the above motion.

The *Lord Chancellor* said the former practice was to allow the plaintiff to move only upon the answer admitting a balance, to have the same paid into court. Afterwards, the court permitted the motion to be made upon an examination. But this court will never try the items of an account ; and in the case of *Mills v. Hanson*, it refused to order a sum to be paid in, upon an accountant's view of the result of an account. The same objection existed in the present case, as in that of *Mills v. Hanson*, and therefore the court could not order any balance appearing by the books in the Master's office, to be paid into court.(1)

(1) The court upon motions of this nature acts almost solely upon an admission of the sum being due. It has gone no farther than to allow the party applying to sum up schedules, and state the balance by affidavit, when that has been omitted by the accounting party.

KERRISON *versus* SPARROW and others.

July 26, 27,
1815.

THIS was an application to dissolve an injunction which had been obtained by the plaintiff, to restrain the defendants who were commissioners of sewers, from removing a float or tumbling bay erected by the plaintiff upon the river Waveney.

The court refused to entertain jurisdiction against commissioners of sewers, to restrain their removing a float or tumbling bay, upon a river; such removal being stated to be irreparable mischief.

The plaintiff being the sole proprietor of the navigation of the above river, and in 1808 the flood gates or waster water gates, at one of the locks called Beccles lock, having become decayed and rotten, he removed the same, and instead thereof put down a float or tumbling bay of the same height. The defendants having thereupon ordered a writ to be directed to the sheriff for impanneling a jury as in the case of an obstruction, an inquisition was taken, and it was found thereby, that the erection of the float was an impediment to the current, which occasioned its overflowing its banks; and that the plaintiff ought to abate and remove the same. The commissioners thereupon ordered the plaintiff to remove the said float, before the 21st October, 1814, under the penalty of an hundred marks.

The bill charged, that if the float were to be removed, the water would be too low for the barges employed in

Mills v. Hanson, 8 Ves. 68. Mr. Romilly, in *Mills v. Hanson*, mentioned the case of *Fisher v. Eamer*, in which an accountant had sworn 50,000*l.* to be due to the plaintiff, and he had been ultimately decreed a debtor. If books are so referred to by the party as to make them part of his answer or examination, and the sum may be clearly ascertained by casting up, the order may be made. *Mills v. Hanson*, 8 Ves. 91.

Kerrison
v.
Sparrow
and others.

the navigation, whereby the plaintiff would suffer irreparable injury, and it prayed a perpetual injunction against the defendants removing the said float.

Sir *Samuel Romilly* and Mr. *Wingfield*, in support of the motion, argued that the commissioners of sewers had no right to destroy the navigation of a river, and which would be attended with irreparable injury to the plaintiff's property. In such a case this court had jurisdiction to restrain them, as had been done by the Duchy Court of Lancaster, another Court of Equity; upon a bill filed for that purpose, in a case of *Hall v. Mason*, stated in *Callis's* reading on sewers, page 262.

[307] Mr. *Hart*, and Mr. *Trower*, against the motion, insisted that this court had no jurisdiction, and that the plaintiff's remedy was by *certiorari* to the king's bench, and cited 4 Com. Digest, title Sewer, D. p. 464. 1 Sid. 78. 1 Salk. 145. 2 Cro. 336. 1 Vent. 78. By the Stat. 23 Hen. 8. c. 5. the commissioners appeared to be justices of the record, with a court of their own and great powers. The same appears from *Callis's* reading, 129.

The *Lord Chancellor* said, there seems to have been a defective verdict in the case of *Hall v. Mason*. He would take time to consider of the present case.

July 27. This day his lordship said he could not restrain the defendants. If, however, he changed his mind by the Monday following, he would mention it with his reasons; but if he did not mention it, the injunction must be considered as dissolved.

His lordship, this day, again mentioned the case, and said that he had looked into the statute, commission, and all the cases, and thought the plaintiff had a shorter remedy in the case than by suit in this court.

Kerrison
v.
Sparrow
and others.

July 31.

EDWARDS *versus* M^cLEAY and others

[308]

Rolls.
July 19,
1815.

IN May 1811, the defendants representing themselves to be seized or entitled in fee-simple, or to have full power and authority to dispose of the fee-simple and inheritance of a messuage, stables, coach-house, lands, and hereditaments, at Clapham, contracted to sell the same to the plaintiff for 5390*l*; and by indentures of the 24th and 25th May, 1811, the same were conveyed to him. The plaintiff afterwards laid out a considerable sum of money in repairs upon the house and premises. Soon after the completion of the purchase, he discovered that part of the fore-court, and of the driving-way or road leading up to the house, together with the whole of the ground upon which the coach-house and stables stood, had been formerly part of Clapham common; and were in 1781, enclosed and taken from the common. The bill charged that the defendants were aware of the above circumstance, and not having disclosed the same to the plaintiff, were guilty of a gross fraud and imposition upon him, and that the plaintiff could not have discovered it from the abstract; and the bill therefore prayed that the contract might be declared void; and that the defendants might be compelled to repay to the plaintiff his purchase-money, and what he had laid out on the premises with interest.

The defendant having sold and conveyed land to the plaintiff, suggesting that he had a title, and it afterwards appearing that he was not entitled to part, the same being an encroachment from a common: though no eviction had happened or was threatened: a bill lies to set aside the conveyance, and for a return of the purchase money, and all expenses.

Edwards
v.
M^r Leay
and others.

[309]

It appeared in evidence for the plaintiff, that the first enclosure of part of the common was in or about 1781, by Thornton, the then proprietor of the house. In 1808 Thornton sold to the defendants. By their answer they asserted, that it was since the filing of the bill that they, for the first time, had heard that the ground on which the coach-houses and stables stand, did formerly constitute part of the common. But they admitted that at the time of making the agreement with the plaintiff, that they had heard it rumoured in the parish of Clapham, that the piece of ground on which four houses, being no part of the said messuage and hereditaments sold to the plaintiff, were built, had been part of the said common.

It appeared that the ground upon which the four houses stood was adjoining to that part of the premises bought by the plaintiff, which had formerly been part of the common. When the defendants purchased, the whole was lying together in one plot ; but they divided off the piece on which the four houses were built, selling the rest only to the plaintiff.

By the evidence of a witness of the name of Copeland, it appeared that in May and June, 1811, there were three vestry-meetings held at Clapham, that he was present, and that the meetings were for the purpose of entering into consideration respecting a claim made by the parish to the piece of waste or common on which the said four houses stood, and to the piece of waste or common on which the stable and coach-house stood ; and that he attended at the desire of Malcolm and defendant Prescott, to let them know what passed at the said meetings, and that he learned that part of the driving way, and that the stable-yard, and ground, on

which the coach-house and stables were built, had been originally enclosed from Clampham Common. He communicated to Malcolm and Prescott the claim of the parish to the said land, and that the parishioners intended to perambulate the boundaries of the parish to ascertain and discover trespasses committed on the said common by the said erections and enclosure, and by other enclosures. Malcolm and Prescott in reply, told the witness that the ground forming the stable-yard, part of the drive or carriage-way, and on which the coach-house and stables, and the four houses are erected, and a field enclosed by a brick wall to a house in the occupation of Mr. Franks, was once part of the said common; but that the same had been enclosed so many years, the parish could do nothing with it, and that the same was as good a freehold as the other parts of the estate. The witnesses stated that he was present on holy Thursday, 1811, when the boundaries of the parish were perambulated, and that the perambulators crossed or passed over, and on the outside of the coach-house, and stables and stable yard, and part of the fore-court of the premises; in a few days afterwards he informed the defendant Prescott what the perambulators had done, who told them that they had done wrong by going over the walls, and going through the stable yard, and part of the front court of the premises.

Edwards
v.
M^r. Leay
and others.

[310]

On the part of the defendants a witness of the name of Willshire, stated that in 1811, he had a conversation with the plaintiff's father, who said that it was very much to be lamented that the defendants had erected the four houses, as they had certainly injured the house which he had bought for and on the part of the plaintiff; and also that he understood the same had given great

Edwards
v.
M^cLeay
and others.

[311]

umbrage to the people of Clapham, who said they were built on the waste. The witness was at the time of the conversation employed as a surveyor by the plaintiff, to prepare plans of the said messuage and lands to be inserted in the plaintiff's deed of conveyance.

The case was argued by Mr. *Leach*, and Mr. *Spranger* for the plaintiff, and by Mr. *Hart* and Mr. *Shadwell*, for the defendants. It had stood a considerable time for judgment, and on the above day, the *Master* of the *Rolls* gave a written judgment as follows :

“ This is a bill of rather an unusual description. It is brought by the purchaser of an estate, who has had a conveyance made to him, for the purpose of setting aside the sale, and getting back his purchase money, on the ground of an alleged misrepresentation with regard to the title to a part of such estate.

It cannot certainly be contended that by the law of this country, the insufficiency of a title, even when producing actual eviction, necessarily furnishes a ground for claiming restitution of the purchase money. By the civil law it was otherwise. By our law a vendor is, in general, liable only to the extent of his covenants.(1) But it has never been laid down, that on the subject of title there can be no such misrepresentation as will give the purchaser a right to claim a relief to which the covenants do not extend. In the case of *Urmston v. Pate*, there was no ingredient of fraud. Both parties misap-

(1) S. P. *Adsit v. Allen*, 2 Johns. C. C. 519. *Gouverneur v. Elmendorf*, 5 *Ibid.* 84.

prehended the law. The vendor had no knowledge of any fact which he withheld from the purchaser. In the case of *Bree v. Holbech*(a) it did not at all appear that the party knew that the mortgage which he assigned was a forgery. Lord Mansfield says, "if he had discovered the forgery, and had then got rid of the deed as a true security, the case would have been very different." And the plaintiff had leave to amend his replication, in case, upon inquiry, the facts would support a charge of fraud.

Edwards
v.
M'Leay
and others.

[312]

Whether it would be a fraud to offer as good a title which the vendor knows to be defective in point of law, it is not necessary to determine. But if he knows and conceals a fact material to the validity of the title, I am not aware of any principle on which relief can be refused to the purchaser. What then is the case made by this plaintiff? He states that the vendors represented themselves to be seized or entitled in fee-simple, or to have full power and authority to dispose of the fee-simple and inheritance of the whole and every part of the premises offered to him for sale without exception, as to any part whatsoever thereof; whereas, in truth, there was a considerable part of those premises to which the vendors had no title, or at least no other title than was derived from a possession, from about the year 1781, of what had been a portion of the waste or common of the manor of Clapham. He asserts that the vendors knew that the part in question was an enclosure from the common—that they did not disclose the fact to him, and that he could not discover it from the abstract. He also asserts that this part of the purchased premises is material to the convenient enjoyment of the rest.

(a) *Doug. Rep.* 630.

Edwards
v
M^r. Leay
and others.

[313]

The defendants admit that they did make such representation as is stated, with respect to the whole of the premises—they say they do not believe that any of those premises ever did compose part of the common ; but supposing the fact to be otherwise, they deny that such fact was within their knowledge. They admit that no such fact appeared, on the abstract, and they also admit the part in dispute to be material to the convenient enjoyment of the rest of the premises sold.

The points then on which the parties are at issue, are only these two. Was this at any time a part of the common ? Was it known by the defendants so to have been ? I say these are the only two points, because I do not find it asserted in the answer, that, supposing the ground in question to have been really taken from the common, the defendants have acquired, or have any means of making, a good title to it.

As to the first, I think it very fully proved, that down to about the year 1781, this piece of ground made a part of the common. Whether a little sooner or a little later is not very material ; but it seems sufficiently ascertained, that it was in that year that Mr. Thornton, the then owner of the house bought by the plaintiff, for the first time separated this spot from the rest of the common. According to the usual progress of an encroachment it was first inclosed with a slight fence or low paling, a passage across it being left open ; the fence or paling was afterwards raised ; and finally the whole encroachment was surrounded with a brick wall. On the other side it is not attempted to be shown, that, prior to the year 1781, this ground was in any way appurtenant to

the adjoining house, or had been in the exclusive occupation of any person whatever.

Edwards
v.
M^r. Leay
and others.

Then as to the second point there is a considerable body of evidence, partly direct and partly circumstantial, tending to show that Mr. Prescott, one of the vendors, and who acted for the rest, must have known that this had been common, and had at different times been claimed by the parish as such. It appears that he was an inhabitant of the parish from the year 1787; that there was a parochial committee established in 1796 for the purpose of watching and guarding against encroachments on the common; that Mr. Prescott was an active member of such committee, and usually attended their meetings; that in the book kept of the proceedings of such committee, he is marked at present on the 1st June, 1801, on which day the following resolution is entered:—"Resolved, That it is the opinion of this committee, that the part of the common taken in by Mr. Thornton, from the house occupied by Mr. Collick to Acre Lane, be continued to the purchaser of his estate on making application to the vestry for the same after the sale, on signing the book as an acknowledgment, and paying a shilling a year to the parish; the Lord of the manor also signing his assent." It is stated, that Mr. Prescott must have been at the meeting on that day; otherwise his name would not have been entered. But whether he was actually present when this resolution passed, nobody can at this distance of time distinctly recollect. It appears by the plan, and by the evidence, that the ground in question in this cause answers the description of that mentioned in the resolution as lying between the house then occupied by Mr. Collick (now by Mr. Franks) and Acre Lane. It farther appears, that before the agreement with the plaintiff,

Edwards
v.
M^cLeay
and others.

some persons to whom the defendants had leased or sold that part of the ground, inclosed from the common, which lay nearest to the corner of Acre Lane, had begun to erect four houses thereon; that complaints had been addressed to Mr. Prescott by differ persons on the subject of these erections, as being made on part of the common; and the defendants themselves admit in their answer, that they had heard it rumoured in the parish that the piece of ground on which the four houses were built had been part of the common. If I rightly understand the evidence, it was by the defendants that the ground on which the four houses were built was first separated from the rest of the ground taken in from the common.

It is farther proved by a Mr. Copeland, that he was employed by Mr. Prescott and a Mr. Malcolm, another of the vendors, (who is since dead,) to attend some vestry meetings held in May and June, 1811, relative to this encroachment, in order that he might communicate to them (Prescott and Malcolm) what should pass at those meetings; and that he accordingly informed them that the parishioners claimed all the ground in question as being taken from the common, and that they intended to perambulate the boundaries of the parish to ascertain what trespasses had been committed on the common. He says, that on his making this communication, Malcolm and Prescott told him that all this ground had once been part of the common, but that the same had been inclosed so many years, the parish could do nothing with it. It appears that the parishioners did, on the 23d, May, 1811, make their perambulation, and that Mr. Prescott inquired and was informed as to the course taken by the perambulators, which was such as to include the whole of the ground in question in what they claimed

as common belonging to the parish. What is the result of all this evidence? not indeed that Mr. Prescott knew, of his own knowledge, that this had been part of the common, or that he had, with his own eyes, seen the encroachment made, but that he had so much information on the subject as made it altogether improper and unfair to represent to a purchaser, as it is admitted he and the other vendors did, that they were seized or entitled in fee-simple, or had full power and authority to dispose of the fee-simple and inheritance of the whole and every part without exception of the premises which they offered to the plaintiff for sale. Be it that he entertained the opinion, which he and Mr. Malcolm expressed to Mr. Copeland, that after such a length of time the parish could not support the claim which they were then making; did he, or could he believe, that he and the other vendors had the same good and unexceptionable title to this spot, as against all the world, that they appeared to have had in the ancient part of the estate? And supposing some of the information to have been acquired, as perhaps it was after the representation had been made, was it fair to allow the purchaser to proceed to complete his contract on the faith of a representation, which the vendors at the time of such completion knew to be substantially untrue? the suppressed facts, if disclosed, would at all events have influenced the price, even supposing the purchaser might have been willing to run a risk with regard to the title. It was contended at the bar that the plaintiff's father, who acted as his agent in the purchase, had notice, though not from the defendants, that this ground had been a part of the common. This is grounded on a passage in the evidence of a Mr. Willshire, who says that some time in or about the month of June, 1811, Thomas Edwards, the father of the plain-

Edwards
v.
Mr. Leay
and others.

Edwards
v.
M^r Leay
and others.

tiff, in conversation with the deponent, said, that it "was very much to be lamented that the defendants had erected the four houses at the corner of Acre Lane, as they had certainly injured the house he had bought ; and also that he understood the same had given great umbrage to the people of Clapham, who said they were built on the waste." This, it is to be observed, relates entirely to the ground on which the four houses were built. It is a little extraordinary that the defendants, who contend, that the rumour which they admit they had heard about this part of the ground being taken from the waste, excited in their minds no suspicion that the ground included in the plaintiff's purchase had ever made part of such waste, should yet insist that the very same degree of information possessed by the plaintiff's father, was to him full notice of a fact which they were unable to infer from such information. But it is still more extraordinary, when we consider the very different degrees of knowledge which the two parties possessed on the subject. The defendants, when they made their purchase, found the whole of the ground which is now proved to have been taken from the common, lying together in one plot. They divided off the piece on which the four houses were built. When they, therefore, heard it asserted that this piece had been taken from the common, they might reasonably enough doubt, whether the whole was not in the same predicament.

But a stranger, who never had seen the ground but in this divided state (which as far as appears was Mr. Edward's case) would have no reason to suspect that what was asserted with respect to one division must equally apply to another, from which it was apparently altogether distinct. Mr. Willshire admits he did not tell

Mr. Edwards that this was a division recently made, or give him any information from which he could collect that the assertion, if true as to one part, must equally apply to the whole.

Edwards
v.
M^r. Leay
and others.

The only other objection which the defendants make to the relief sought by the bill is, that the plaintiff is premature in his application, inasmuch as he has not yet been evicted, and may perhaps never be evicted. But I apprehend that a court of equity has quite ground enough to act upon, and that it ought now to relieve the plaintiff from the consequences of the fraud practised upon him. It may be true that the commoners are barred by having acquiesced for more than twenty years in the enclosure. But the Lord will not be conclusively barred till sixty years shall have elapsed. I have already observed that the defendants do not pretend that there is any circumstance from which a title in them can be inferred, supposing the fact established that this made part of the common. Though the Lord may never assert his right, is the plaintiff to be compelled to remain for twenty-five years longer in a state of uncertainty whether on any day during that period he may not have the convenience of his habitation entirely destroyed. I apprehend the court is bound to relieve him from that state of hazard into which the misrepresentation of the defendants has brought him.

There must, therefore, be a decree for setting aside the sale, and repaying the purchase-money with costs. The defendants must likewise pay to the plaintiff all the expenses he has been put to, relative to the sale; and he must have an allowance for any money he laid out in repairs during the time he was in possession."

*Before the
Vice Chan-
cellor,
August 1, 4,
1815.*

LORD DORCHESTER *versus* EARL OF EFFINGHAM.

Widow held
not to be put
to her elec-
tion by a de-
vice to her for
life of a man-
sion-house
and fifty acres
held with it,
being part of
the same es-
tate out of
which she
claimed dower.
(1)

By settlement, dated 20th May, 1772 and made previous to the marriage of Lord Dorchester with one of the defendants, Maria Lady Dorchester, the portion or fortune to which the said Lady Dorchester was entitled, consisting of personal property, thereby directed to be invested in bank stock, was settled on the said Lord Dorchester for his life, afterwards to the said defendant Lady Dorchester for her life; and after the death of the survivor of them for the benefit of their children, in the manner therein mentioned, without any reference as to the dower to which the defendant, Lady Dorchester, might become entitled out of the estates of the said Lord Dorchester, in the event of her surviving his Lordship.

In 1802, Lord Dorchester purchased the fee-simple and inheritance of a messuage and premises in Up Nately, and also enclosures and other land thereto belonging, containing about thirty-three acres. And in 1804, Lord Dorchester also purchased the mansion called Stubbings; and the lands usually held therewith, containing about fifty-four acres; and also a messuage or farm house, and lands in Bisham, containing about 229 acres.

Lord Dorchester, by his will, duly executed, dated 29th October, 1807, after bequeathing to the defendant,

(1) An intent to exclude dower by a gift must appear either by express words, or by necessary implication. If there is any thing ambiguous, then the averment that the gift was in lieu of dower cannot be supported. *Birmingham v. Kirwan*, 2 Sch. & Lefroy, 451.

Lady Dorchester, a legacy of 500*l.* desired that their marriage agreement might be fully complied with, and that the bank stock there alluded to be entirely at her disposal ; and that she might have the interest and profits of the remainder of that stock for life, and after her death he left the said remainder to his executors in trust, to increase his landed property ; and he desired that she might have Stubbings' house during her life, with the ground then in hand, about fifty-three acres ; all the stock thereon alive and dead he gave her ; and all the household furniture, with the linen, plate, clothes, books, manuscripts, maps and drawings ; and the said testator directed that all his landed estates should be attached to his title as closely as possible : and all the timber, woods and trees, on his estates ; and all his debts due from government ; and his personal property not otherwise disposed of, he left to his executors in trust to increase his landed property.

Lord Dor-
chester
v.
Earl of
Effingham.

Lord Dorchester died on the 7th May, 1808.

By the Master's report, made in pursuance of a decree directing the inquiry, he stated that as Lady Dorchester had no jointure settled upon her in lieu or bar of dower ; he was of opinion that she was entitled to dower in or to the said messuage or tenement, barn, stable and yard in Up Nately, and the several enclosures and lands thereto belonging, containing about thirty-three acres ; and he was of opinion that she was also entitled to dower out of the mansion-house and estate called Stubbings, which consists of about 283 acres of land, if she thinks fit to forego the benefit of the devise to her by her late husband, of the said mansion-house, and fifty-four acres of land, part of the said Stubbings' estate.

Lord Dor-
chester
v.
Earl of
Effingham.

To this report, Lady Dorchester took an exception; for that the Master ought, so far as regards the Stubbings estate, to have stated that she was entitled to dower out of that estate, save and except as to the mansion-house, and fifty-four acres of land, part thereof, devised to her for life, by the will of her said late husband.

Mr. Courtenay (in the absence of Mr. Leach, who was with him,) was heard alone in argument, in support of the exception. He contended, that the devise of part of the estate, namely, of the mansion house, and the fifty-three acres of land held with it, to Lady Dorchester for life, could not have the effect of excluding her from dower out of the rest. Nothing was expressed upon or necessary to be inferred from the will against her taking both. Neither was the devise of Stubbings' house and the fifty-three acres, a gift upon any condition that she should not have her dower out of the rest of the estate. It was reducible to a question of intention upon which Lady Dorchester might claim the benefit of the devise and of her dower. The case of *Birmingham v. Kirwan*,^(a) was in its circumstances very like the present case, in which lord Redesdale held that a wife was entitled to the benefit of a devise of a house and demesne for her life, paying a trifling rent, and was entitled to dower out of the residue of the estate, although the same were devised over. In *Strahan v. Sutton*,^(b) an annuity given to the widow was held by Lord Alvanley not to exclude her from dower; and that in order to compel a widow to elect to take under a will or dower, the two claims must be inconsistent with each other. There was no inconsistency in the present case in Lady Dorchester's taking

(a) 2 Sch. & Lef. 444.

(b) 3 Ves. 249.

she is entitled to? The passage in his will, from which under the will, and also her dower as to the rest of the estate. The testator probably intended that she should occupy the mansion and grounds held with it, and also have a third of the rents.

Lord Dor-
chester
v.
Earl of
Essexham.

Sir *Samuel Romilly* and Mr. *Trower* on the other side.

The rule is, that if it appears that the testator intended that his widow should take only a certain interest, then she must elect; the only question therefore is, whether the testator in this case intended that Lady Dorchester should take only a limited part of the estate, not her legal right in the whole. If the argument for the widow is well founded in this case, she must be entitled to dower, even out of the fifty-three acres, being part of one entire estate out of which she claims such right, which is absurd, if she also claims such fifty-three acres under the will. It is inconsistent to claim her thirds of the 283 acres, and at the same time to claim the whole of the mansion-house, and of fifty-three acres for her life. But it is to be collected that the testator did not so intend, from the passage in his will, in which, after the devise to his widow of the fifty-three acres, he directs "that all his landed estates should be attached to his title as closely as possible." Those words clearly express an intention to exclude the widow from claiming dower. The widow cannot take against the will and under the will at the same time.

Mr. *Leach* in reply.

Nothing is better settled in the profession than that the widow's right to dower can only be excluded by plain expression or necessary implication. As to the

Lord Dor-
chester
v.
Earl of
Effingham.

first, there is none. As to the second, how can the enlarging her interest in a part, by gaining her an estate for life in it, be supposed to mean that she should not have dower in the general estate? In the absence of authority no such implication arises. But there are several cases directly in point, *Lawrence v. Lawrence*,^(a) and *Lemon v. Lemon*,^(b) and *Hitchen v. Hitchen*.^(c) As to the point, that the gift here is of a part of one entire estate, there is too much refinement in it for the court to act upon. Every man's estate is his entire estate; and it can make no difference as to dower, whether he has it all by one title or by twenty different titles.

The Vice Chancellor.

Out of respect to the Master, as well as to look into the cases, I will not entirely dismiss this case, but I will state my present opinion. It is clear that the will in this case does not express in terms that the widow is to be barred of dower. If she is then to be barred, the court must collect it by inference. A court must be cautious in doing this, it being dangerous to collect by guessing and conjecturing that a testator meant what he has not said. The testator in this case might not have been apprised of any thing about dower when he sat down to give his wife the enjoyment of the house and grounds about it for her life. Probably he had no intention in any way as to dower, out of the rest of his estate. Why should he be supposed desirous of excluding her from dower, from any part of the Stubbings estate, and same time to have meant to leave the thirty-three acres open to her right of dower, which the plaintiffs admit that

[324]

(a) 2 Vern. 365.

(b) 2 Eq. Cas. Abr. 353. pl. 13.

(c) Prec. in Chan. 133.

an intention is said to be collected of excluding her from dower, would equally exclude her from dower of the thirty-three acres as from the rest of the estate. The intention collected from those words failing as to the thirty-three acres, upon what principle can it be applied to the other land? The argument derived from its being the same estate, is certainly ingenious; but in the case of *Birmingham v. Kirwan*, the *Chancellor* expressly puts the question, whether the implication extends to the rest of the estate, not to the rest of his estates; and he determined that it did not. It seems difficult to distinguish that case from the present; the widow there having a devise to her of part of an estate for her life, and the will disposing of the remainder of the same estate to another person for life. As to the words in the will about attaching the testator's land to his title as closely as possible, they create no inconsistency with the claim of dower. That claim may postpone or abridge such object in the testator, but it is not absolutely inconsistent and incompatible with it; and both object and claim may stand together.

Lord Dorchester
v.
Earl of Effingham.

This day the *Vice Chancellor* said, he had looked into the authorities, and reconsidered his opinion, which he still retained, and therefore ordered the exception to be allowed.

Aug. 46.

The CASE of the ship HARMONY.

THIS was a petition, praying that a writ of prohibition, returnable in the court of king's bench, might issue

[325]
Before the
Vice Chancellor.
July 26, 27,
1816.

Prohibition
to the prize-
Court for pro-
ceeding after

Case of the
Ship
Harmony.

treaty of peace
with America,
refused.

to the right honourable the judge of the Admiralty Prize Court, to prohibit him from farther proceeding, or holding plea before him in a suit by the American captors to be released from recapture of the ship or vessel called the Harmony.

The British ship Harmony, whereof George Norman was commander, with a cargo of wine and cork, British property, on board, sailed from Oporto for London, on the 26th February, 1815, and in the prosecution of the said voyage was seized and taken as prize on the 2d of March following, in latitude 42 deg. north, and longitude 12 deg. west, off Cape Finisterre, by the American privateer James Munroe, David Williams commander. A few days after the capture, John Nelson, the mate, who alone of the former crew was left on board, formed a plan for recapturing the vessel, and on the 24th of the said month of March, in latitude 47 deg. 47 min. north, and longitude 28 deg. 13 min. west, cut down the prize master and wore ship for England, arriving at Falmouth on the 7th of April.

Proceedings were soon afterwards instituted in the Admiralty Prize Court by Nelson, as salvor of the said ship; and a warrant was decreed in due form to arrest the said ship and cargo for salvage, on recapture from the enemy. By interlocutory decree of the said court, [326] on the 6th of May, 1815, the said ship and cargo were condemned in such salvage; but farther decreed to be restored to Alexander Hutchisen, who claimed as owner of the ship, and to William Lynch, who claimed the cargo, on payment of their proportions of the salvage. This being afterwards paid, the ship and cargo were accordingly restored to them.

On the 26th of the said month of May, proceedings were instituted in the said Court of Admiralty, on behalf of the said American captors, claiming to be released from the recapture; whereupon a monition was decreed against Nelson and the owners of the ship and cargo, to show cause why the ship and cargo should not be released, because the recapture had been effected after the period specified in the late treaty of peace between Great Britain and the United States of America.

Case of the
Ship
Harmony.

The said treaty of peace was ratified on the 17th of February, 1815. The London Gazette of the 14th of March, advertising the treaty, contained a proclamation, stating, that "in order to prevent all causes of complaint and dispute, with respect to prizes that might be taken after the space of twelve days from the ratifications the treaty, it had been reciprocally agreed, that all vessels and effects which might be taken after the space of twelve days from the ratifications, upon all parts of the coasts of North America, from the latitude of twenty-three degrees north, to the latitude of fifty degrees north, and as far eastward in the Atlantic ocean as the thirty-sixth degree of west longitude from the meridian of Greenwich, should be restored on each side; and that the time should be thirty days in all other parts of the Atlantic ocean, north of the equinoctial line or equator."

[327]

The British owners petitioned for the prohibition to stop the American captors from proceeding in the prize court in consequence of the recapture.

Mr. Hart, Dr. Lushington, and Mr. Heald, in support of the prohibition, contended that the jurisdic-

Case of the Ship Harmony. tion of the Prize Court, being derived from a commission, ceased with the war. The capture originally was not legal. But there can be no power under the commission for the Prize Court to order restoration to the captors, the commission and hostilities being only co-existent. The argument on the other side must go to this length, that if the reseizure were even ten years after the treaty of peace, it must still be tried in the Prize Court. The treaty also being silent as to recaptures, leaves the question as to parties repossessing their property, upon the common law right. In all cases of capture, the property of the original owner continues until the ship is carried *infra præsidia*; but in this case it never was carried there. Lord Coke's 4 Inst. 154. was relied upon, as in point to the present case.

The *King's Advocate*, Dr. Adams, and Mr. Cooke, for the captors, opposed the prohibition. The jurisdiction of the Prize Court, if not by the express terms of the commission, is incidental to it. The power of restoring is incidental to the power of condemning. The words in the commission are, that the court shall determine "according to the course of admiralty and laws of nations." Now, the course of admiralty has been to [328] determine in cases like the present. The cases of the ship *Mentor*, in 1799, (a) of the *Helena*, (b) and of the *Oceano*, in 1811, captured the 27th July, of the *Nostra Senora de los Dolores*, (c) were similar in principle to the present case; so also were the cases of the *Adolphus Frederick*, (d) after the war, in 1747, after hostilities were to cease, and of the ship *Hostage*, captured after

(a) 1 *Robinson's Adm. Rep.* 179. (b) 4 *Ibid.* 3.

(c) 1 *Edward's Adm. Rep.* 60. (d) 5 *Rob. Adm. Rep.* 189.

the treaty of Utrecht. The *jus belli* is a right admitted by us in an enemy. If the recapture is unlawful, then it can convey no civil interest, and the right must be in the American *jus belli*. Up to a great extent the prize jurisdiction is admitted, for the property is held under that jurisdiction; otherwise the parties holding it have no right at all, for the property was in the captor's *jus belli*. It is impossible to do justice to this sort of case in an action of trover. The case cited from Lord Coke is inapplicable, as not being the case of a capture of war. Lord *Redesdale*, in *Montgomery v. Blair*,^(a) had refused to entertain a prohibition in term time; and said that Lord *Thurlow* had also refused so to do. The anonymous case in *1 Perre Williams*,^(b) also shows, that the application for a prohibition must be in the common law courts, except in vacation. There was nothing to prevent the application in the present case being made to a court of law, the monition of the captures having been served on the British owners on the 29th of May, three days only after Trinity term had commenced. In *Turner v. Cave*,^(c) a prohibition was denied, upon the principle that not only the original capture, but all the consequences should be tried in the Prize Court. [329]

The *Vice Chancellor*, in giving judgment, said, that if the only objection to the prohibition had been the preliminary one, that the courts of law were open when it might and should have been applied for, he should have had difficulty in yielding to that objection, at least without farther consideration, because he thought the court bound to grant the writ, if a proper case is made out. In

(a) 2 Sch. & Lef. 136. (b) 1 P. W. 476.

(c) *Vide Doug. 532. cited from Carth. 20. 1 Lev. 243.*

Case of the
Ship
Harmony.

his view of the case, however, he did not think that point material. Still, however, an application elsewhere was open to the present petitioners. In the present case there were two questions : First, what was the nature and jurisdiction of the Admiralty Court ? Secondly, was the present case within it ? As to the first, it was necessary to travel into authorities. But from the case of *Le Caux v. Eden*,^(a) it was clear that the question of prize or no prize belonged to the admiralty jurisdiction. From *Lindo v. Rodney*, stated in a note to the above case, it appeared that even the place of capture was not material, and that the jurisdiction of the prize court followed the prize, not only into port, but even to land. It was also not amiss to notice the judgment of Lord Chief Justice *Lee*, in the case of *Key and Hubbard v. Pearse*, stated from his own manuscript,^(b) in which he says, “in a question of prize, the common law court has no right to prohibit ; to prove it, in 1 *Sid.* 320., it is said by the court, inasmuch as the matter there was “prize or no prize,” no prohibition shall go; and in *Carth.* 476. 10 Will. 3 per cur. “prize or no prize,” is a matter not triable at common law, but altogether appropriated to the jurisdiction of the admiralty. The true reason why the jurisdiction is appropriated to the admiralty is, that prizes are acquisitions *jure belli*; and *jus belli* is to be determined by the law of nations, and not by the particular municipal law of any country : nor had the counsel cited one instance where a prohibition was ever granted in a cause of prize. The sole jurisdiction, therefore, in matters of prize being the Admiralty Court, the only question here remaining is, whether the present case is a question of prize or no prize. Now, there was not

[330]

(a) *Doug.* 572.

(b) *Stated Doug. Rep.* 584.

Case of the
Ship
Harmony.

much dispute about the facts of this case. The ship was captured on the 2d of March, the treaty of peace being ratified on the 17th of February. By a legitimate act of warfare the belligerent American privateer possesses himself of the British ship; and it is for twenty-two days in his undoubted complete hostile possession. By a gallant enterprize the mate recaptures the ship, and brings it into a British port. The owners seek to dispute the right of the captors to the capture, which depends upon whether it was made within certain limits of time and place, or not. The captors say hostilities had not ceased at the time, and in the place of the capture; and they on the other hand dispute the legality of the recapture. These facts being controverted, what court is to determine such facts? Can a court of common law settle them? What principle but the *jus belli* can determine the question of law? Can the courts of common law act upon such principle? Where is the treaty of peace to be construed? Is the Court of Admiralty incompetent to advert to and construe it? Where a question is not between subject and subject, but between nation and nation, it must be determined according to the law of nations; and therefore the court familiar with that law must try it. Whether a ship is taken before twelve at night, with the other circumstances of time and place, in what degree of latitude and longitude, in short, all the data to lead to the conclusion of rightful or wrongful seizure, properly belong to the Admiralty Court. So, whether the right was perfected, the ship never having been brought *infra præsidia*, or condemned. If it is said that the original owner is remitted to his ancient right, and that the municipal law is to try it in an action of trover, and not the law of nations, I ask what authority or case is there for that assertion? Surely it cannot

[331]

Case of the
Ship
Harmony.

be said that a question of *jus belli* and the construction of a treaty can be tried in trover, because a question of property. The observation of Dr. Adams was very just, that in all questions of prize or no prize, resort should be had to that forum and code which all nations recognize, instead of to the municipal court where the prize is brought, and that in many treaties it was even recognized that it should be so. It was not an invidious preference of one court over another, to say that such question should be decided by a court recognizing the principles of the law of nations. The court which has issued the monition in the present case, does act upon those principles. If the original title of the captors was divested by perfected capture, their whole title stands on recapture, which must surely be tried *juri belli*. It is putting too narrow a construction upon the words of the commission, to say that they only give power to the prize court to adjudicate and condemn, until the treaty takes place. The capture, and all its consequences must be tried in the prize court. The cases which have been mentioned show this, as *Turner v. Cave*, the cases of the *Mentor*, *Helena*, *Oceano*, *Adolphus Frederick*, and *Hostage*. In truth, if the objection were well founded, it would go a great length, and oust the jurisdiction of the prize court in many cases. You cannot oust the jurisdiction, because it may turn out that there has been an unlawful capture.

[332]

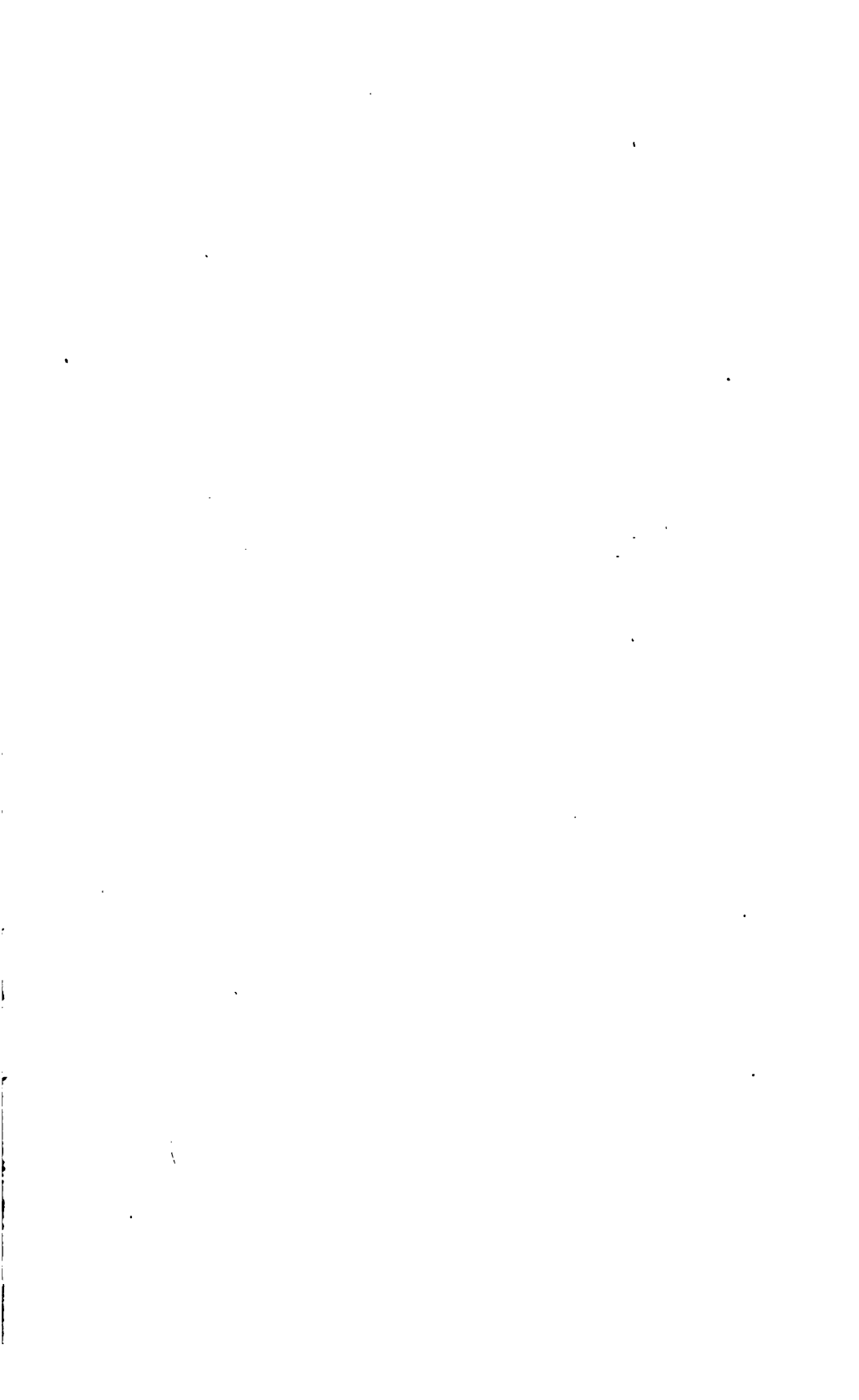
It is quite unnecessary to consider how long the prize jurisdiction must continue. In every war there must be a certain time for hostilities to cease, which are always continued *de facto* after they should have ceased *de jure*. There must also be a sort of twilight or continuance of prize jurisdiction, the same as over acts *flagrante bello*.

Captures must be made after every war, to be decided upon by some principles, and by some code of laws. It would be unfortunate if such cases must go to the municipal law. The authority in 4 Inst. in my judgment, does not touch the question; it does not even appear that any prize-court then existed. There is nothing in the prize act assisting the question of jurisdiction. But upon the whole, I think the prohibition must be refused, unless I mention again to the contrary within a short time.

Case of the
Ship
Harmony.

The *Vice Chancellor*, two days afterwards, mentioned the case again, to state that he continued of the same opinion.

Prohibition refused.



AN

I N D E X

or

THE PRINCIPAL MATTERS.

A.

ACCOUNT.

See PRACTICE, 22.

ADEMPTION.

See LEGACY, 4.

ADMINISTRATION.

See EXECUTOR, 3.

AGREEMENT.

1. Notwithstanding two private acts of parliament, reducing younger children's portions in proportion to the other interests in the estate, the court would not enforce an agreement entered into by one of the younger children, in execution

of the private acts, thereby consenting to accept a stated sum in satisfaction ; such agreement being inserted by the plaintiff's solicitor in a receipt from her, on paying her a small sum of money, and she being in great distress and embarrassment at the time. *Kemeys v. Hunsard.* 125

2. Bill to set aside a compromise, upon the discovery of a forgery, unknown to the plaintiffs at the time of the compromise being entered into, dismissed, under the circumstances. *Lloyd v. Passingham.* 152
3. Compensation for the dry-rot in house and premises, decreed, upon representations of the vendor to the

purchaser as to the state of repairs ; the purchaser relying upon such representations, and stating to the plaintiff that he did not employ a surveyor for that reason. *Grant v. Munt.* 173

4. The reversion of an estate having been put up to sale by public auction, describing it as leased with a covenant on the part of the tenant to repair ; and the purchaser objecting to the title because no counterpart of the lease was in the possession of the vendors ; it being stated to be in the hands of a party under a partition of the estate made some time before : the court thought that such counterpart ought to be deposited for the benefit of all parties, before it could compel the purchaser to take. *Shore v. Collett.* 234

5. The defendant having sold and conveyed land to the plaintiff, suggesting that he had a title ; and it afterwards appearing that he was not entitled to part, the same being an encroachment from a common, though no eviction had happened or was threatened ; a bill lies to set aside the conveyance, and for a return of the purchase money, and all expenses. *Edwards v. McLeay and others.* 308

ALIENATION.

See BANKRUPT, 6.

ANNUAL RESTS.

See INTEREST, 3.

ANSWER.

See PRACTICE, 18. 26. 29.

ANNUITIES.

1. The Court of Chancery has jurisdiction, even after the grantor of an annuity has twice failed at law in his attempts to set aside the annuity, to declare it void, and order the securities to be delivered up, and the payments of the annuity from the date of it to be deducted from the consideration paid for it. The price paid by the grantee, and not that by the assignee, is to be taken in the account. The decree at the Rolls, directing the account of payments made by the grantor, only from the bill filed, was reversed. *Bromley v. Holland.* 9
2. Questionable whether the summary jurisdiction over property given by the annuity act, is not unconstitutional. *Ibid.* 20
3. If grantee of an annuity voluntarily destroys his deeds to conceal their defects, and sues upon the memorial at law, a Court of Equity will take cognizance of the case. *Ibid.* 21

ARBITRATION.

See PRACTICE, 24.

ATTORNEY.

See PRACTICE, 9.

ASSETS.

1. A direction in a will to pay simple contract creditors before specialty

ones, is not void ; it being within the exception in the statute of fraudulent devises. *Millar v. Horton.* 45

2. Where the vendor of an estate would have absorbed the personal assets in payment of his purchase money, a rateable contribution was decreed as between the devisee of the estate and the legatees and annuitants under the purchaser's will. *Headly v. Redhead.* 50

B.

BANKER.

See CONDITION.

BANKRUPT.

1. Petition to stay certificate not being served till the day of petitions, though not answered till the day before, the bankrupt declared entitled to his certificate. *Ex parte Brenchley.* 97
2. Where partners are the petitioning creditors, signature of the bond by one is sufficient. A joint creditor taking a security from one partner on account, but which is not paid, does not render the debt a separate debt. *Ex parte Hodgkinson.* 99
3. A bankrupt cannot be compelled to join in a conveyance by his assignees. *Wagh v. Land.* 134
4. Certificate discharges attachment against an executor, for non-payment of a sum of money. *Wall v. Atkinson.* 198

5. Construction of Lord Rosslyn's order of the 26th January, 1793. In a country commission the party is not entitled to twenty-eight days, and as much more time as may be necessary for the post. *Ex parte Henderson.* In the matter of Johnstone. 227

6. Bankruptcy held not a forfeiture under a clause in a will against alienation. *Wilkinson v. Wilkinson.* 259

7. A bankrupt himself cannot be chosen the assignee of his own estate. *Ex parte Jackson.* 286

See CONDITION. MORTGAGE, 3. PRACTICE, 30.

BARON AND FEME.

See MAINTENANCE, 3.

C.

CANAL.

See PRACTICE, 8. PLEADING, 8.

CERTIFICATE.

See BANKRUPT, 4.

CHARITY.

Constructive trusts held not within the 52d Geo. 3. c. 101. which gives relief upon petition in the case of charities. *Ex parte Brown.* 296
See PLEADING, 27.

COMMISSION TO EXAMINE WITNESSES ABROAD.

See PRACTICE, 28.

COMPOSITION OF CREDITORS.

See PLEADING, 6.

CONDITION.

Payment of money into a banking-house to be placed to the credit of another, upon a condition; the money in the mean time to stand in the banker's books in the name of the party paying it in: it is at his risk, and the loss is his, if the bankers fail before the condition is complied with, though the other had written to desire it to be paid in generally. *Calley v. Short.* 148

See LEGACY, 3.

COPYRIGHT.

If the proprietor of a work gives permission to several to publish it, and then others copy it, he must bring his action before he can have an injunction to restrain the pirating his copy-right. *Platts v. Button.*

303

COSTS.

See LUNACY, 2. 4. PRACTICE, 3.

CROSS REMAINDERS.

See DEVISE, 5.

D.

DEVISE.

1. Devise and bequest of real and leasehold estate to the defendant, "and her heirs for ever, in the fullest confidence, that after her de-

cease she will devise the property to my family," is an estate in fee at law, but only for life in equity with a trust as to the inheritance. The decree at the Rolls confirmed, with this qualification as to the declaration of the parties, right. *Wright v. Atkyns.* 111

2. A will devising real estates for life, with remainder "to my family," the heir at law is entitled under that term, *ibid.* 117

3. A will devising estates for life, without impeachment of waste, is not revoked by a codicil, directing the trustees to let until tenant for life married; such leases under restrictions, one of which was that the leases should not be unimpeachable of waste. *Luskington v. Boldero.* 216

4. Devise "of all my said manors, lands, tenements and effects, real and personal," to one for life; and after his decease to his issue male, and the heirs male of such sons successively one after another; with remainder to A. "and in default of his issue male as before," then over to B. "and in default of his issue male as before," then to the plaintiff. A. held entitled for life, with remainder to his first and other sons in tail male; B. to take in remainder in the same manner, and that the plaintiff was entitled to the ultimate remainder in fee. *Macnamara v. Lord Whitworth.*

241

5. A testator having devised his real estates to be settled on his two daughters, in equal proportions undivided, for their lives, with remainder to their issue severally and separately in tail general, with cross remainders over: the court thought that the settlement should contain not only cross remainders as between the children of the two daughters, but also as between the two families. *Horne v. Barton.*

257

DOWER.

See ELECTION.

E.

ELECTION.

Widow held not to be put to her election by a devise to her for life of a mansion-house and fifty acres held with it, being part of the same estate out of which she claimed dower. *Lord Dorchester v. Earl of Effingham.*

319

See PRACTICE, 17. 34.

ESTATE IN FEE SIMPLE.

See DEVISE, 1. 4.

ESTATE FOR LIFE.

See DEVISE, 4.

EVIDENCE.

1. Hand-writing of a relation deceased, rejected as evidence of pedigree. *Edwards v. Harvey.* 39
2. The Fleet book of marriages, not

evidence as a register. *Lloyd v. Passingham.* 162

3. Cross examining a witness in equity, is no waiver of an objection on the ground of interest, to the competency of such witness. *Moorhouse v. De Passou.* 300

See MORTGAGE, 1. 4.

EXCEPTIONS.

See PRACTICE, 12. 26, 27. 31.

EXECUTOR.

1. Executors cannot lend money on personal security, though words which may imply a discretion so to do, are used by the testator. *Wilkes v. Steward.* 6
2. Surviving executor held entitled to the whole residue, where the executors had unequal legacies; and though the testator had left his will unfinished, a blank being in the ordinary place for the residuary clause. *White v. Williams.* 53
3. A receiver having been appointed, the executor being out of the jurisdiction; on administration afterwards taken out, it was referred to the Master to reconsider the appointment of a receiver, regard being had to the administration granted. *Faith v. Dunbar.* 200
4. After a lapse of six or seven years, equity will not restrain by injunction a creditor of an executor from taking in execution the goods of a testator for the executor's own debt. *Ray v. Ray.* 264

F.

FOREIGN COURT,

See PRACTICE, 34.

FRAUDULENT DEVICES.

See ASSETS, 1.

I.

INJUNCTION.

See PRACTICE, 10. 24.

INROLLMENT.

See PRACTICE, 19.

INTEREST.

1. Interest given on a note of hand from the time of its becoming payable. *Lithgow v. Lyon.* 29
2. Bonds, though they necessarily carry interest, being given for instalments made up of principal and interest, being the consideration of a purchase or assignment of real and personal estate, are not usurious. *Tarleton v. Backhouse.* 231
3. Annual rests are not directed in the accounts against a mortgagee in possession from the middle of the time, but only from the beginning in a special case, or not at all. *Davis v. May.* 238

INTERPLEADER.

1. Interpleader may be in favour of an Insurance Company against the landlord of premises which have been burnt down, but insured by him ; and the tenant of the premi-

ses, under an agreement for a case ; and claiming therefore a right to have the money laid out in rebuilding the premises. *Paris v. Gilham.* 56

See PRACTICE, 5.

J.

JURISDICTION.

See AGREEMENT, 5. ANNUITY, 1, 2, 3. PRACTICE, 8. SEWERS.

L.

LEGACY.

1. Legacy to the testator's "name-sake Thomas, the second son of his brother John." John had no son of the name of Thomas ; but his second son's name was William, who was held entitled. *Stockdale v. Bushby.* 229
2. Upon the construction of a will, the gift of a residue after a life interest to the testator's next of kin ; held to mean next of kin at the death of the wife, and not those living at the testator's death : they having express bequests under the will. *Miller v. Eaton.* 272
3. Residue by will given "to my nearest surviving relations in my native country Ireland;" brothers and sisters living held exclusively entitled, against nephews and nieces ; but sisters resident in America not excluded. *Smith v. Campbell.* 275
4. Legacy of 1000*l.* not adeemed by

transfer by testator of stock into his and legatee's joint names. *Wetherby v. Dixon.* 279

5. A bequest of the balance of my account with "the interest thereon, to be vested by my executors in the hands of trustees whom they shall choose and name, the income arising therefrom to be for her sole use and benefit," is an absolute interest, and not a life estate merely. The prior gift of the sum is not limited by the subsequent mention of its produce, and the direction as to trustees is not restrictive. *Adamson v. Armitage.* 283

See PRACTICE, 13.

LIEN.

- A party entitled as equitable tenant in tail under a settlement in which is a covenant to convey lands to the uses of such settlement; afterwards, and upon his own marriage covenants also to convey lands of less value: though he obtains a decree for the execution of the first mentioned covenant, the second covenant is no lien in equity upon the lands so decreed to be conveyed. *Gardner v. The Marquis of Townshend.* 301

LUNATIC.

1. Where a lunatic had been tried for murder, and acquitted on account of his lunacy, but ordered by the judge to be detained; the Lord Chancellor declined ordering him to be removed out of gaol to a proper receptacle for lunatics, the

proper application being to the king in council. *Ex parte Hill.* 54

2. No costs upon liberty given to traverse an inquisition in lunacy. *Sherwood v. Sanderson.* 108
3. The residence is the proper place at which to execute a commission of lunacy. *Ex parte Baker* 205
4. Costs of the committee of a lunatic trustee conveying within the statute must be paid out of the lunatic's estate. *Ex parte Brydges.* 290

M.

MAINTENANCE.

1. Maintenance under the circumstances given to a father, who had 6000*l.* a year of his own, and although no report of debts had been made. *Jervoise v. Silk.* 52
2. Maintenance ordered, upon the fair inference of intention, where legacy was given to children "when" and "as" they attain twenty-one, with survivorship in case of any dying under that age; and if all die the legacy to cease. *Lambert v. Parker.* 143
3. Where husband and wife lived separate by mutual consent, and no evidence of any cruelty on the part of the husband, and he had before marriage settled part of her property on her; the court refused to decree maintenance. *Duncan v. Duncan.* 254

MATERIAL EXCEPTIONS.

See PRACTICE, 26.

MISREPRESENTATION.

See AGREEMENT, 3. 5.

MORTGAGE.

1. Bill to redeem after twenty years upon parol evidence of conversation with mortgagee dismissed. *Whiting v. White.* 1
2. Mortgagor applying for time, after having obtained the order under 7 Geo. II. c. 20. need not have his money ready as at law. *Wakerell v. Delight.* 27
3. Tenant in common of a moiety having obtained a decree for a redemption of his moiety, afterwards takes a conveyance of the equity of redemption of the other tenant in common; and then files a supplemental bill for a redemption as to that; stating that a prior conveyance of that equity of redemption, by the assignees of that tenant in common who had been a bankrupt, and in which conveyance the bankrupt had joined, was void as against the bankrupt, having been improperly made. Bill dismissed, being supported by the evidence of the bankrupt alone. *Waugh v. Land.* 129
4. Bill for the redemption of a mortgage after twenty years, upon the evidence of a conversation proved by one witness only, dismissed: His honour the Vice Chancellor, however, was of opinion that parol evidence was admissible in such cases. *Reekes v. Postlethwaite.* 161
5. Redemption refused, though account delivered within twenty

years, it being so delivered without any authority by a receiver and manager of the estate, and the employer being in a state which rendered him incapable of managing his affairs. *Barron v. Martin.* 189

See INTEREST, 3. PLEADING, 3, 4, 5. PRACTICE, 1.

N.

NEW TRIAL.

See PRACTICE, 14.

P.

PAROL EVIDENCE.

See MORTGAGE, 1. 4.

PETTY BAG.

See PRACTICE, 15. 23.

PLEADING.

1. If the trustee of a term to secure the payment of an annuity assigns the term to a third person, such third person should be a party to a suit to have the securities delivered up as void. *Bromley v. Holland.* 18
2. Information against a corporation, stating that they were seized of real estates, partly for purposes of public utility, and other part in trust for private charity; and charging a general misapplication of the funds, and praying relief accordingly; a demurrer for multifariousness was allowed. *Attorney General v. Corporation of Carmarthen.* 30

3. Plea of the stat. 32 H. 8. c. 9.
 - a. 3. against buying and selling pretended titles; and also that there was not any mortgage as mentioned in the bill: to a bill that the defendant might redeem a mortgage upon a covenant in a lease from the defendant to the plaintiff, held good, though a negative plea. *Hitchins v. Lander.* 34
 4. Heir at law filing a bill to redeem a mortgage, having also bought in the claim of a third person to the heirship; if he himself is found upon an issue not heir, he cannot by supplemental bill have the benefit of the original suit, as the purchaser of the heirship in such third person. On demurrer to supplemental bill. *Tonkin v. Lethbridge.* 43
 5. Plea (to a bill to redeem a mortgage) of a conveyance by the mortgagor of the equity of redemption, in trust to sell and pay the mortgage, and a bond debt from him and two other persons, and a conveyance from the trustee to the mortgagee, nobody offering at an auction so much as was due for the mortgage money, with interest and costs: ordered to stand for an answer, with liberty to except. *Stabback v. Leatt.* 46
 6. Deed of composition by creditors, not signed within the time stated in it, though void at law, yet if the creditors act under it who have not signed it, it is good in equity. Plea of two creditors not having so signed it, therefore held bad. *Spottiswood v. Stockdale.* 102
 7. Dissenters may sue by information, in the Attorney General's name, for charity estates belonging to them. *Attorney General v. Lord Dudley.* 146
 8. Equity cannot compel resort to commissioners appointed under an Act of Parliament, to settle disputes between parties arising from a navigation, a lease for years having expired, and the landlord proceeding to recover possession. Demurrer allowed. *Stanhope v. Pilkington.* 193
 9. Answer taken off the file, where the title omitted the words "to the bill of complaint of." *Pieters v. Thompson.* 249
- POWER.**
1. Power of appointment in a marriage settlement held to comprehend, as to its objects, all the children of the marriage, and not to be confined to such of the children only as should be living at the death of the survivor of the parents. *Howgrave v. Cartier.* 66
 2. Direction to trustees to cut trees in aid of testator's real and personal estate, held not a trust, but a mere power, upon the whole of the will. *Gower v. Eyre.* 156
- PRACTICE.**
1. A receiver cannot be appointed without mortgagee's being before the court, if a mortgage appears upon the face of the pleadings. *Price v. Williams.* 31

2. Purchase under a decree of the court, is not entitled upon an affidavit that he has had his money lying ready for some time, to be let into possession of estate and receipts of rents for all such time so passed. *Barker v. Harper*. 32
3. Vendor not making a good title, ordered to pay costs, though he was only a trustee to sell. *Edwards v. Harvey*. 40
4. Receiver ought not to be appointed where there is a trustee with power of entry and distress. *Buxton v. Monkhouse*. 41
5. The plaintiff, in a bill of interpleader, is not entitled, after replying to the answers, to move for his costs, but must set down the cause for hearing. *Jones v. Gilham*. 49
6. Arrears of annuity ordered to be paid to widow and executrix, although no report of debts had been made, it being stated by her answer that there was no deficiency of assets. *Skinner v. Sweet*. 54
7. A surety for a receiver is entitled to stand in the place of the receiver, to be paid sums ordered to the receiver out of funds in court, in respect of disbursements made by him, the money for making such disbursements having been advanced by the surety, and the same giving him therefore a lien on the money ordered to be paid to the receiver. *Glossop v. Harrison*. 61
8. Though the court will not restrain an action of trespass by a party, through whose estate a canal is cutting, for deviating from the line, because he has laid by and rested upon his legal rights; yet if he files a bill to restrain their deviating, and then moves to commit them, the court will not do so, without a trial by a jury in a disputed case, and directing an issue at law. *Agar v. Regent's Canal Company*. 77
9. A solicitor for one of the parties in a suit cannot become the solicitor for the opposite party, though he is separated from the partnership which jointly were so employed on the other side, and the remaining partner still continues so employed, and the deed of dissolution stipulated that he should not act as solicitor for that party. On motion for an injunction to restrain such solicitor who had gone over from so acting. *Earl Cholmondeley v. Lord Clinton*. 80
10. Injunction granted in this court, though the Court of Law in which the action has been brought, have, upon an application made to it to stay proceedings, on a release of one of the plaintiffs, and affidavits of the circumstances of the case, refused to stay proceedings. *Whitfield v. Ralfe*. 89
11. Motion by one tenant in common who had agreed to sell to the other, that the latter should pay his purchase money into court, refused; where such purchaser had been before and at the time

- of the purchase in possession of the whole, with the approbation of the other tenant in common. *Freebody v. Perry.* 91
12. Exceptions to the Master's report, as to impertinence, is not cause against dissolving an injunction. *Corsan v. Stirling.* 93
13. A residuary legatee has not such an interest as to prevent his becoming himself a purchaser of premises sold under a decree in the cause. *Hooper v. Goodwin.* 95
14. When the Court of Chancery directs an action to be tried at law, though it is with special directions, as that the bankruptcy of the defendant shall not be pleaded in bar, and that the parties shall be examined on oath, the application for a new trial must be to the Court of Law; but it is otherwise with an issue. *Ex parte Kensington.* 96
15. Order to set down demurrer in the petty bag for argument, made upon motion in court. *The King v. Knox.* 98
16. Private hearings always on the consent of both parties. In the Matter of *Lord Portsmouth.* 106
17. After order to elect to proceed at law or in equity, a receiver appointed by this court cannot distrain for rent, without undertaking to proceed in equity only. *Mills v. Fry.* 107
18. After order for time to answer, a demurrer may be taken off the file. *Dyson v. Benson.* 110
19. After enrolment of a decree, errors appearing on the face of schedules permitted to be corrected upon motion, without a bill of review; but the court will not permit an affidavit producing a new fact to be used for that purpose. *Weston v. Haggerston.* 134
20. On the trial of an issue *deviseavit vel non*, directed by this court, all the witnesses to the will should be examined. *Bootle v. Blundell.* 136
21. Motion against purchasers in the Master's office, to pay in their purchase money, refused; the estate sold being copyhold, limited for life, and then in remainder; and the remainder-men being abroad, he not having surrendered. *Noel v. Weston.* 138
22. Plaintiff not entitled upon paying the common costs of amendment, to change entirely the nature of his bill, as by converting a prayer for an account against a bailiff, into a bill to foreclose a mortgage; after an issue against the plaintiff, finding him a mortgagee. *Smith v. Smith.* 141
23. After verdict in an action in the petty bag, an application to discharge the defendant for not having been charged in execution within two terms, must be made to the King's Bench; but the court to remove any difficulty made a collateral order. *Fraser v. Lloyd.* 187
24. Injunction granted, upon bill filed and affidavit, to restrain proceedings in an arbitration, under the circumstances. *Mylne v. Dickinson.* 195
25. Motion to bring into court the

- shares of prize money belonging to claimants abroad, who had not come in under the decree in the cause, refused. *Good v. Blenmitt*. 197
26. Upon exceptions taken to an answer for insufficiency, the Master may look to the materiality of them, and overrule immaterial exceptions. *Agar v. The Regent's Canal Company*. 212
27. Defendant in contempt, and some exceptions allowed to his answer, and some overruled. If the plaintiff excepts to the Master's report as to the exceptions overruled, as well as the defendant to those which the Master has allowed, the defendant is entitled to a subpoena for a better answer, after the plaintiff's exceptions have been allowed by the court, and the defendant's disallowed. *Ibid*. 221
28. A commission for the examination of witnesses abroad, may issue before answer, where the suit is merely for a discovery and commission. *Noble v. Garland*. 222
29. Motion to commit upon a fourth insufficient answer, refused; the plaintiff not having a report of the insufficiency of such fourth answer, though the defendant had filed a fifth answer. *Const v. Ebers*. 262
30. Order, after several witnesses had been examined, to withdraw rejoinder, and rejoin *de novo* for the purpose of giving notice under stat. 49 Geo. III. c. 121. s. 11. of the intention to dispute act of bankruptcy, and petitioning creditor's debt; but upon the terms of under taking to pay such costs as the court might afterwards direct. *Brickwood v. Miller*. 270
31. Exceptions to a report may be taken off the file, if filed after the report has been confirmed absolute. *Sterling v. Thompson*. 271
32. Attachment not discharged, though order for time had been obtained. Service of a copy of the order not being good service, unless the production of the original is dispensed with by the opposite party. *Walkis v. Glynn*. 282
33. After publication passed, before the hearing witnesses cannot be examined in the Master's office, as to any of the same facts, without special order. A petition was directed to be presented. *Willan v. Willan*. 291
34. Plaintiff put to his election where suing in this court, and in a foreign court of law. *Pieters v. Thompson*. 294
35. The court refused to order money to be paid into court, appearing upon books deposited in the Master's office. *Roe v. Gudgeon*. 304
- PRIVATE ACT OF PARLIAMENT
See AGREEMENT, 1.
- PROHIBITION.
Prohibition to the Prize Court for proceeding after treaty of peace with America, refused. *Case of the ship Harmony*. 325
- PROMISSORY NOTE.
See INTEREST, 1.

PROPERTY TAX ACT.

The Property Tax Act, 46 Geo. III.
c. 65. s. 112 and 116. in declaring
covenants to pay the same, void,
has a retrospective operation ;
therefore covenants entered into
before the act passed, are void. *Buxton v. Monkhouse.* 41

Q.

**QUALIFICATION TO SIT IN
PARLIAMENT.**

Injunction granted to restrain the
defendant from suing for a rent
charge granted to qualify him to sit
in parliament, the purpose never
having been answered. *Platamone
v. Staple.* 250

R.

RATEABLE CONTRIBUTION.

See ASSETS, 2.

RECEIVER.

See PRACTICE, 1. 7. 17.

REDEMPTION.

*See MORTGAGE, 1. 3, 4, 5. PLEAD-
ING, 4, 5.*

RESCINDING CONTRACTS.

See AGREEMENT, 2. 5

RESIDUE.

See LEGACY, 2, 3.

REVOCATION.

See DEVISE, 3. WILL.

S.

SERVICE.

See PRACTICE, 32.

SEWERS.

The court refused to entertain juris-
diction against commissioners of
sewers, to restrain their removing
a float or tumbling-bay upon a ri-
ver, such removal being stated to
be irreparable mischief. *Kerrison
v. Sparrow and others.* 305

SOLICITOR.

See PRACTICE, 9.

SURETY.

See PRACTICE, 7.

STATUTES.

Statutes 38 Hen. VIII. c. 9. s. 3.
See PLEADING, 3.
Statute 7 Geo. II. c. 20.
See MORTGAGE, 2.
Statute 36 Geo. III. c. 90.
See EXECUTOR, 3.
Statute 46 Geo. III. c. 65.
See PROPERTY TAX ACT.
Statute 52 Geo. III. c. 101.
See CHARITY.

T.

TENANT *pur autre vie.*

*Quasi tenant in tail of a freehold lease
for lives, may by surrendering the
old lease, without the trustees join-
ing, and taking a new lease to him-*

self, bar the remainders over, notwithstanding there were prior existing trusts at the time of such surrender. *Blake v. Luxton*. 178

TIMBER.

See POWER, 2. WASTE, 1, 2.

TRUST.

1. Power to lend trust money upon real or personal security, does not enable trustees to accommodate a trader with a loan upon his bond. *Langston v. Ollivant*. 33
 2. Words of confidence, if the object be certain, and the subject ascertained, in equity always create a trust. *Wright v. Atkins*. 115
 3. Purchase of trust property, by trustees, for their own benefit, set aside after a considerable lapse of time and several assignments. *Attorney General v. Lord Dudley*. 146
 4. Bill to set aside a purchase by a trustee for himself and his children, after a lapse of eighteen years, dismissed upon the length of time only. *Gregory v. Gregory*. 201
 5. Where a term was created, and no trusts of it declared, but the estates devised to tenants for life, with remainders over, the court decided that there was no resulting trust as to the term, but that it attended the inheritance. *Sidney v. Miller*. 206
 6. Where a trustee refused to consent or object to a marriage, the court referred it to the Master to consider of the propriety of the marriage. *Goldsmid v. Goldsmid*. 225
- See LUNATIC, 4.

U.

USURY.

See INTEREST, 2.

W.

WASTE.

1. Tenant for life entitled to timber for repairs cannot sell the same to reimburse herself expenses incurred in repairs. *Gower v. Eyre*. 156
2. Tenant for life without impeachment of waste, other than wilful waste, held entitled to the interest of money produced by sale of timber. Any claim of tenant for life to cut timber, a question at law only. *Wickham v. Wickham*. 288

WIDOW.

See ELECTION.

WILL.

Where a testator interlined his will to except the plaintiff who was named a legatee under it with others, and also made a codicil expressly excluding him, but afterwards obliterated the codicil without doing the same with the interlineation of the will; the court admitted the plaintiff to an equal interest with the other parties taking under the will, considering the inference as certain that the testator so intended. *Utterson v. Utterson*. 60

WITNESSES.

See PRACTICE, 20. 28. 33.

Pages 347 to 352 missing.





JSN JAC TPG
Cases argued and determined in
Stanford Law Library



3 6105 044 653 934

